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Supreme Court of the United States

OCTOBER TERM, 1962

No. 37

MASSACHUSETTS, PETITIONER,

vs.

DONALD M. PAINTEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1963

CERTIORARI GRANTED FEBRUARY 25, 1963

Table of Contents.

Relevant docket entries	1
Petition for writ of habeas corpus	2
Transcript of hearing	8
Donald M. Painten	9
Direct examination by Mr. Nordlinger	9
Petitioner's Exhibits 1 and 2 marked	10
Cross-examination by Mr. Davis	12
Donald M. Painten, resumed	14
Direct examination by Mr. Nordlinger	14
Cross-examination by Mr. Davis	18
Redirect examination by Mr. Nordlinger	22
Emmett F. McNamara	23
Direct examination by Mr. Davis	23
Cross-examination by Mr. Nordlinger	29
Redirect examination by Mr. Davis	35
Cornelius J. Crowley	36
Direct examination by Mr. Davis	36
Cross-examination by Mr. Nordlinger	42
Opinion	45
Order	56
Motion for stay	57
Notice of appeal	57
Motion for issuance of certificate of probable cause under Rule 87 (A) and section 2253 of Title 28	58
Order	59

	Original	Print
Proceedings in the United States Court of Appeals for the First Circuit	60	60
Motion for stay and order thereon	60	60
Motion for remand and order thereon	60	60
Supplement to record on appeal filed	60	60
Motion for bail and order thereon	60	60
Hearing	60	60
Opinion, Aldrich, C.J.	61	61
Concurring opinion, Coffin, J.	65	64
Judgment	66	66
Motion for stay filed	66	66
Motion for bail filed	66	66
Memorandum and order of Court entered	66	66
Election filed and mandate stayed	66	66
Order re Bail entered	67	66
Clerk's certificate (omitted in printing)	68	67
Order allowing certiorari	69	67

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 64-78-C.

DONALD M. PAINTEN,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent,

Relevant Docket Entries.

1964

Nov. 12 Petition for Writ of Habeas Corpus with Exhibits A, B, & C, filed.

1965

Dec. 30 CAFFREY, D.J. Hearing on Petition for Habeas Corpus, evidence, (pet'r. testifying) upon the joint request of counsel, memos to be filed by 2/4/66.

1966

Mar. 31 CAFFREY, D. J. OPINION FILED. Writ of Habeas Corpus is allowed.

31 CAFFREY, D. J. ORDER ENTERED. In conformity with Opinion of the Court filed this date, it is ORDERED: 1. The judgment of conviction on the basis of which petitioner is in custody is vacated. 2. That the Comm. of Mass. bring petitioner to a new trial on these charges within 60 days from this March 31, 1966, or discharge him from custody.

April 5 Defendant's Motion for Stay, filed.

5 Defendant's Notice of Appeal, filed.

6 Respondent's motion for issuance of cert. of Probable Cause under R 87 (a) and sect. 2253 of title 28, filed in the office of the clerk 4-5-66.

7 CAFFREY, D. J. DENIED: Deft.'s Motion for Stay. ALLOWED: Respondent's motion for issuance of certificate of probable cause under Rule 87 (A) and Sec. 2253 of Title 28.

7 CAFFREY, D. J. CERTIFICATE OF PROBABLE CAUSE ISSUED.

11 CAFFREY, D.J. ORDER ENTERED. "The Opinion filed herein on March 31, 1966 is amended as follows: On page 8, line 10, by inserting after the word *supra* "at 622 n. 5." On page 16, line 7, by striking "5" after 41 n. and substituting "12" therefor."

Petition for Writ of Habeas Corpus.

[Filed November 12, 1964.]

To the District Court of the United States for the District of Massachusetts.

Donald M. Painten, your petitioner, respectfully shows:

1. He is a citizen of the Commonwealth of Massachusetts.

2. He is unjustly and unlawfully detained and imprisoned in a prison known as The Massachusetts Correctional Institution, Concord, in the County of Middlesex, Commonwealth of Massachusatts.

3. The causes of such detention are certain orders of commitment, issued by Judge Frank J. Donahue of the Massachusetts Superior Court, ordering that your petitioner be imprisoned and detained in a Massachusetts Correctional Institution for concurrent terms of nineteen to twenty years and nine to ten years from March 24, 1958 and an additional term of two years to be served after the

expiration of the above. Copies of these orders of commitment are hereto attached and made a part hereof and marked Exhibit A.

4. Said restraint and imprisonment are illegal and in violation of Article Fourteen of the Amendments to the Constitution of the United States, and as grounds therefor your petitioner states under oath the following:

(a) the trial justice of the Massachusetts Superior Court erred by failing to grant or even to act one way or the other on your petitioner's motions for bills of particulars; these motions were filed because the indictments did not sufficiently describe the alleged offenses and thereby denied the defense the opportunity to properly prepare these cases.

(b) The trial justice erred by permitting the prosecution to discriminate against your petitioner because he could not raise bail, whereby during the trial before a jury, the petitioner was confined towards the rear of the courtroom in a wire mesh cage exposed to shame and ridicule, whereas, co-defendants who had raised bail were permitted to sit outside the cage and give the appearance of being sufficiently trustworthy to come and go as they pleased, thereby placing your petitioner in a prejudicial situation before the jury and rendering him, in addition, unable to hear much of what was going on at the witness box and at the Bench.

(c) The Commonwealth of Massachusetts erred by amending an indictment in the midst of the trial, thereby denying your petitioner his right to know before the commencement of the trial the essential components of the indictment and rendering him unable to properly prepare a defense.

(d) The trial justice erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to guilty in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a State's witness immediately

after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or the reward of a sentence based on his degree of cooperation.

(e) The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the Grand Jury.

(f) The trial justice erred when he permitted your petitioner's prior record of imprisonment to be revealed to the jury in an indirect manner when your petitioner had elected to not testify for fear his record would unduly influence the jury to find him guilty unjustifiably. The trial justice compounded this error by conducting a line of questioning of a witness which brought out your petitioner's prior imprisonment, thereby giving to the jury an unwarranted impression that the Court was eliciting valuable testimony. The trial justice further compounded the error during his instructions to the jury when he referred to your petitioner having been an inmate of the Massachusetts Correctional Institution, and when your petitioner had not at any time during the trial taken the witness stand to open up thereby his past criminal record. Massachusetts law provides without question that a defendant's prior criminal record shall not be disclosed to the fact-finder where the defendant does not testify. Therefore the trial justice's error in this case clearly denied the petitioner equal protection of the laws.

(g) The trial justice erred when he permitted certain articles to be marked for identification and then taken as evidence and when he permitted these articles to be displayed and explained to the jury and when in fact it was evident that these articles had been seized in the petitioner's apartment and that the police had entered the apartment without displaying a search warrant and when it was

evident from the testimony of the police who conducted the search that, in fact, they had no search warrant, and had acted without probable cause. This error was rendered more prejudicial when certain dollar bills found during the search of petitioner's apartment were used by the Commonwealth in a misleading way to infer guilt on the part of the petitioner.

(h) The trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial. Despite the fact petitioner had elected to not testify, the trial justice stated, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . . .". Petitioner Painten had no record for rape, but irrespective of that fact any record which he had could never have been properly placed before the jury. The trial justice misled the jury further during his instructions by stating a completely erroneous recollection of a witness' answer. In this instance, the trial justice, during his instructions to the jury, mentioned that an eye-witness saw in the trial justice's words "these men over there" when in fact this witness as is shown by the transcript of the trial never said that he saw the defendants at this trial, including your petitioner, but in fact, this witness, a Mr. Glynn had testified in response to a question of the judge himself "you can't tell us what the men looked like that got out of the car I suppose can you?" to this Mr. Glynn, the witness, had testified, "No, I wasn't paying too much attention at that time to them." And during further direct examination by the District Attorney and cross-examination by various defense counsel, this witness had reiterated the fact that he had never had an opportunity to see either the faces of the people at a particular stage following the crime nor had he even seen enough of their bodies or the sides of their faces to be able to give

the court a description of the profile view or description of the build or stature of the men he had seen as he witnessed certain events following the commission of the crime. Therefore, the trial justices remarks to the jury at the conclusion of the trial grossly misled the jury in such a way as to commit serious error to the detriment of your petitioner.

5. Your petitioner has availed himself of all the remedies available to him in the Commonwealth of Massachusetts. Following the trial before the Superior Court, or trial court, the defendants had their cases reviewed by the Supreme Judicial Court of Massachusetts. The decision was adverse to your petitioner and it appears as Commonwealth v. Binkiewicz, Painten, and Hayes 342 Mass. 740, 175 N.E. 2d 473 (1961). A copy of this decision is appended to this petition and marked Exhibit "B". Your petitioner has raised all the points alleged in this petition for Writ of Habeas Corpus before the Supreme Judicial Court of Massachusetts, and on a preliminary hearing, that Court denied a full hearing on the merits and dismissed your petitioner's petition for Writ of Error and Assignment of Errors filed in the Supreme Judicial Court. On April 8, 1964, that Court did enter a final judgment disposing of the petition and assignments of error which your petitioner had sought to present before the Supreme Judicial Court of Massachusetts. A copy of the order of the Supreme Judicial Court and a copy of the petition for Writ of Error and Assignments of Error are appended to this petition and marked Exhibit "C". Your petitioner has no further avenue to seek redress in the Commonwealth of Massachusetts.

Wherefore, your petitioner prays that a Writ of Habeas Corpus be issued by this Court commanding the Superintendent of the Massachusetts Correctional Institution, Con-

cord, to produce the body of the petitioner before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of petitioner, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid.

Dated: October 22, 1964

DONALD M. PAINTEN

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. October 22, 1964

Donald M. Painten, being duly sworn, says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and the said statements therein are true as he verily believes.

Sworn to before me:

LOUIS M. NORDLINGER
Notary Public (Seal)
Commission expires Sept. , 1967

"A."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 64-78-C

DONALD M. PAINTEN,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

CERTIFICATE OF PROBABLE CAUSE

I certify that there exists probable cause for an appeal by the respondent, Commonwealth of Massachusetts, in the

above-captioned case, in which the petitioner, Donald M. Painten, seeks the issuance of a writ of habeas corpus, and in which a decree in favor of petitioner has been entered by this Court.

ANDREW A. CAFFREY
Andrew A. Caffrey
U. S. District Judge

April 7, 1966.

Attest A True Copy
WILLIAM J LYONS
Deputy Clerk

Transcript of Hearing.

CAFFREY, D.J.

Appearances:
Louis M. Nordlinger, Esq., for the plaintiff;
William Davis, Esq., for the defendant.

Court Room No. 2,
U. S. Post Office and Court House,
Boston, December 30, 1965

[2] Mr. Nordlinger. Good morning, your Honor.

Mr. Davis, representing the Attorney-General's office, in the Commonwealth of Massachusetts, is in court with me before your Honor this morning. We are to present whatever evidence we have concerning the two allegations which your Honor has assigned for hearing this morning.

If your Honor will permit us to do so, I would like to present evidence concerning the first allegation and then have Mr. Davis present his evidence regarding the first allegation; and then present evidence on the second, rather than having the testimony covering both at once.

The Court. O. K.,

DONALD M. PAINTEN, *Sworn*

Direct Examination

Q. [By Mr. Nordlinger] Now, sir, you are Donald M. Painten, is that right? A. That is right.

Q. Presently confined at the Massachusetts Correctional Institution, Concord? A. Correct.

[3] Q. And, sir, you are the petitioner in this matter, is that right? A. I am.

Q. Now, sir, I would like to direct your attention to the date of the trial. Can you tell us first when was this trial that is the subject here, an approximate date is good— A. It started in June of 1958.

Q. Was this or was this not a jury trial? A. It was a jury trial.

Q. How many defendants were there? A. Four defendants.

Q. Do you have a recollection of the court room in which this trial was conducted? A. I do.

Q. Can you state to this Court, during the trial, where were you and the other three defendants? Name them, if you recall their names Where were you located in the court room during the trial? A. Michael Binkiewicz, co-defendant, George Hayes, co-defendant, and myself, were lodged in a cage situated nearly centrally in the court room. [4] The other co-defendant, John Bratkon, was seated to the right of the cage and outside of the cage, at the time of the trial, all during the trial.

Q. May I ask you, sir, whether any of the defendants testified for the Commonwealth in this case? A. Yes, John Bratkon testified for the Commonwealth.

Q. This is the defendant who is outside the cage? A. He was seated outside the cage, yes.

Q. Did any of the defendants inside the cage testify on behalf of the Commonwealth? A. No, no, sir.

Q. May I ask you, sir, if you remember where the jury was located in this court room? A. They were located to the right, diagonally to the cage, where the cage was situated, to a point to the right of the cage, toward the front of the cage, looking on an angle, toward the inhabitants of the same cage.

Q. Would it be correct to say, sir, from the Judge's point of view in that court room, if it were like this court room today, the jury would be located to the Judge's left, and therefore looking out to the cages, right? [5] A. If this court room were reversed, I will put it that way, if it were reversed, the Judge would be facing, say I were in the cage at this point, the Judge would be at the back wall, the jury would be to the right, that would be on the Judge's left.

Q. And on your right as you looked out of the cage? A. On my right.

Q. Now, sir, I am going to show you some photographs. I would ask you if you can identify any of these as representing the cage in which you were confined in that court room? A. These two photographs represent the cage that I was sitting in, yes.

Mr. Nordlinger. If your Honor please, may these be marked for identification, and taken as exhibits in this case?

The Court. Which do you want, identification or exhibits? Do you want them in evidence?

Mr. Nordlinger. Yes.

The Court. Exhibits.

Mr. Davis. No objection.

[Photographs of cage marked Petitioner's Exhibits 1 and 2 in evidence.]

[6] Q. Now, sir, taking your position, where you were in the cage, where your position is right now today, can you tell us about how far your position in the cage was from

the position in which your counsel was seated or located at the counsel table? How far? A. I would say near the distance of those chairs that are in back of you, the end of that table.

Q. So you would say something in the order of about 15 feet, approximately 15 feet? A. Probably closer to 20 or 18 feet.

Q. This trial went how many days, sir, do you recall? A. I believe it went thirteen.

Q. Were you in the cage throughout the entire period of the trial? A. Yes, except for the time of sentencing the last day.

Q. Sir, before the trial, at the time the trial was beginning, did you discuss your confinement in the cage with anybody, or make any request regarding your confinement in the cage? A. I spoke to one of the court officers. I asked him what was the reason that three of us were being put in the cage, one defendant was being left outside of the cage. He said this is the normal court procedure in cases such as this.

[7] Q. Did you make any request to be removed from the cage? A. I asked the court officer, why shouldn't I be able to sit so that, at the table with my attorney, I could consult with him? It never went any further than that. He said that is not the way it is done.

Q. At any time during the trial were you unable to communicate with your counsel or to contact your counsel because of confinement in that cage? A. Very definitely. In that court room, the way that was set up, my attorney's back was to me and he was facing the Court. On many many occasions I wished to communicate with him but because of the distance away and the fact of disrupting the court proceedings I had to let it go and try to make a contact and try to get my thought across to him when court

recessed. But, many times it was beyond any point of establishing anything I wished to, at that time.

Q. From your position in the cage, sir, were you able to hear all of the testimony from the witness stand? A. I was able to hear the testimony, mostly I heard the better part of it. I did have some difficulty in viewing the evidence that was being put in as exhibits or if evidence, I would have trouble seeing what it was because of the barrier that was in front of me, [8] because I had difficulty in seeing, but I could hear the testimony, yes.

Mr. Nordlinger. I have no further questions at this time.

Cross-examination

XQ. [By Mr. Davis] Mr. Painten, what crime were you charged with in 1958? A. Armed robbery, masked and disguised, larceny of an automobile, and conspiracy.

XQ. Armed robbery. Was it with a weapon? A. Allegedly.

XQ. Were you able to raise bail? A. No, sir.

XQ. What was your bail? A. It was quite high. I think it was $100,000.

XQ. Do you know whether or not Mr. Bratkon was able to raise bail? A. I don't. I don't believe he was. I believe he had a parole warrant violation that was outstanding against him, and this foreclosed any possibility of bail.

XQ. Mr. Painten, do you remember whether or not the [9] Judge charged the jury that your presence in the cage should not prejudice your case in any way? A. I don't recall that, no.

XQ. Do you recall whether or not your attorney at the time requested the Judge to make such a charge? A. No, I cannot say that I do.

XQ. You have also stated, Mr. Painten, your lawyer's back was to you. You were not able to communicate with

him. Tell me, was there a court officer facing you? A. There was a court officer seated beside the defendants, co-defendant Bratkon, outside of the cage. Now, whether there was a court officer or just the person taking the testimony, the court stenographer in front, I am not quite sure.

XQ. And this court stenographer, he was far back? A. No, he was up sitting below the Judge's bench.

XQ. The reason I ask, Mr. Painten, you said you spoke to the court officer about being in this cage? A. Yes. He transferred us from the lock-up outside of the court room, to the cage itself. He was the one that opened the door, the locked door and put us into the cage.

[10] XQ. He did not remain near you while the trial was in process, is that right? A. A matter, perhaps, of six feet.

XQ. Could you have gotten his attention? A. Probably, if I crawled over the other co-defendants.

XQ. Did you in fact get his attention and request he ask your lawyer to step back and confer with you? A. I don't believe I could have done it, because I could create some type of disturbance in the court room.

XQ. You stated you could hear but not see all the evidence presented? A. Without some difficulty, I could not, no.

XQ. Was your lawyer able to see the evidence presented? A. I believe he was.

Mr. Davis. No further questions, your Honor.

The Court. All right.

Mr. Nordlinger. If your Honor please, we have nothing further to present on this allegation.

Mr. Davis. I have nothing.

The Court. Do you want to go forward on the other one?

Mr. Nordlinger. Yes, if your Honor please.

[11] DONALD M. PAINTEN, *Resumed*

Direct Examination

Q. [By Mr. Nordlinger] Now Mr. Painten, directing your attention to a certain time before your trial at a time when certain items were taken from an apartment in which you were living and which you may recall were used as evidence during the trial, first, may I ask you, sir, where were you living prior to your arrest to stand trial on this matter? A. I was living on Dartmouth Street. I believe now the number is a little bit hazy.

Q. Can you give us the nearest avenue? A. Oh, yes, Columbus Avenue and Dartmouth Street. I was living near the Back Bay Station, I believe it was 120 Dartmouth Street.

Q. Were you living there, sir, alone or with another person? A. I was living there with another person.

Q. And, sir, what floor was this apartment on? First let me ask you if it was an apartment or a room? A. Yes, it was an apartment.

Q. How many rooms? A. Kitchen, living room, bedroom, bathroom.

[12] Q. On what floor, sir, of the building? A. The second floor, from the street.

Q. All right, sir. Now, can you remember the day of the week that these items were taken or that this entry was made, can you remember the day of the week? A. If my memory serves me, if we classify the first floor as one floor, the second floor, I was living on the third floor, if you want to count the mezzanine as the first floor. Now, as to the day and night, it was a Saturday, March 1st of 1958.

Q. And, sir, shortly before the officers came to your apartment, where were you an hour or so before they came? A. I had left my apartment about, I would say about eight o'clock at night, and I had gone out with a gentleman to

obtain some pizza and a chicken for supper. We were gone approximately an hour and I returned. On the return to the apartment I stopped at the corner of Dartmouth Street and Columbus Avenue. There I was let out of the car, the car was double-parked. At that time the officers in an unmarked car pulled up beside. They had to wait while I was getting [13] out of the car, to go in and conduct some business in a liquor store. I was buying some liquor for the weekend. That took about 30 seconds, for me to get out of the car and go into the liquor store. The car of the gentleman I was with proceeded on up, he went up, I do not know, to find a place to park. I went in, made my purchase, and returned to my apartment where I asked a friend there who was waiting for me, a woman friend, where the other fellow was that had been with me, whether he had returned. She said No, he had not. About five minutes after that he did return, he told me that he had been stopped by the police, his car had been searched, he had been searched and that was the reason why he was late getting back. So that was the end of that.

Q. Now at some time did persons representing themselves to be officers arrive at your apartment? A. Yes, I would say about five minutes after that they did.

Q. This is about how long after you arrived at the apartment? A. I would say about, approximately fifteen minutes.

[14] Q. Now, sir, were these the same persons you state were riding in an unmarked police vehicle when you entered the liquor store? A. I did not interview the officers at that time in the car. I do know it was a police car behind us.

Q. First tell us how many persons came to the door, what happened? A. Well, I was in the bathroom and a knock came to the door. Well, I said, "Wait a minute." And I finished what I was doing and I came out. I opened

the door and as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them. I asked what this was all about. Now, when I answered the door I had no reason to believe it was anybody else except somebody that should belong in the apartment because there is a lobby door that locks downstairs. So it was my impression when I opened the door that it was somebody from one of the other apartments who had knocked at my door.

Q. How many persons were there at the door? A. I believe there were three officers.

Q. Were two in uniform, or not? A. Plain clothes.

[15] Q. Do you see any of those officers here in the court room today? A. I see one of them, I think, two, and I think you are blocking my vision.

Q. Pardon me?

The Court. You are blocking his vision.

The Witness. All right, I see two officers that were here.

Q. Can you point them out, where they are, on the spectators' bench? A. It was a long time since I have seen Mr. McNamara, I can remember him. I am not sure of this fellow, whether his name is White.

Q. Are you looking at the second bench? A. That is right.

Q. The gentleman sitting— A. Sitting close.

Q. On the left, as we view it? A. That is right.

Q. Now, will you tell us, sir, continue telling us what happened after you opened the door? A. There was some words exchanged and questions asked, which I was a bit confused, about all that was [16] happening and moments later, I would say a couple of minutes later, another officer arrived that had been situated out in the rear of the apartment. He came in, went through the kitchen, out onto the fire escape and came back in with a bag that contained two

guns, and some .32 and .45 caliber ammunition. Things sped along right at that time. I was taken down to Station 4.

Q. Let me stop you there for just a minute. When these people entered your apartment, did you make any inquiry of them why they were there, and did they answer you? A. Just there to look around.

Q. What did you ask them? A. I asked them, I said, "What do you want?" Naturally, I asked them, what do you want, what is the beef? and I was told, Oh, we are just here looking around.

Q. Do you remember either of the two officers you see in the court room today were the ones that answered you? A. I think Mr. McNamara answered me, yes.

Q. Did they say anything further to you while they [17] were in the apartment? A. Just conversation, just that—I don't really recall.

Q. Do you recall any of the officers leaving the area of the doorway and going somewhere else in the apartment? A. Yes, one of the officers, I don't recall which one, went searching above in the closets and in the dead area and in the living room, bedroom, and at that time we were then taken out, when the guns were produced, taken out and taken down to the station house. What took place after I left the apartment, I cannot state.

Q. Did you see the officers taking anything from your apartment other than what this officer from the outside retrieved from a fire escape, the weapons and ammunition, was anything else taken in your apartment? A. There were other articles taken but I did not see them take them out, no. I think that after I had been removed—from what I understand—after I had been removed to the station-house a further search was conducted of the whole apartment. [18] I think they took also at that time a box of .32 shells and at that time I was there, and then later on

and subsequent searches there were other articles removed, yes.

Q. Do you remember any of the material from your apartment appearing during your trial, to be used as evidence? A. Very definitely.

Q. What articles were used? A. There was a box of .32 caliber shells that was produced. There was a box of wax paper. There was the guns. There was serial numbers of money allegedly found in my possession, that came from a bank robbery.

Q. Now, do you recall, sir, again the transcript will speak for itself, I don't have a copy of it with me, I would like to ask you from your recollection whether you discussed the matter of the seizure of these articles and entry made by the police, whether you discussed this with your counsel? A. Yes, I did.

Q. Was anything done as a result of that, which you know about? [19] A. Well, nothing that I know about, no.

Q. During the course of trial when these articles were produced? A. There were obections raised.

Q. Do you recall this? A. I do recall my attorney objecting, yes.

Mr. Nordlinger. I have no further questions, your Honor.

The Court. All right.

Cross-examination

XQ. [By Mr. Davis] Mr. Painten, who lived with you on Dartmouth Street? A. A woman.

XQ. I am a little bit confused, Mr. Painten. I thought you said a minute ago when you arrived back at your apartment, a woman was waiting for you, you were looking for the fellow living with you? A. No, no, I was living with a woman.

XQ. Who was the fellow you were waiting for? A. Mr. Ash.

XQ. What is his first name? A. George.

[20]. XQ. George Ash. I notice you refer to Officer McNamara by name. Is it fair to say you had quite a few dealings with Officer McNamara? A. No, I would not say it was fair to say that.

XQ. You have had some dealings with him? A. Just this dealing, yes.

XQ. Just this? A. That is correct.

XQ. Also, according to your testimony, sir, you stated the officers came in with a bag containing a .32 caliber pistol and a .45 caliber pistol? A. That is correct.

XQ. Did in fact these guns belong to you? A. No, they didn't.

XQ. They did not? A. They did not.

XQ. Do you know whether or not they belonged to your friend? A. I could not say.

XQ. Were they in fact in your apartment? A. They were not found in my apartment.

XQ. Were they in your apartment? A. Yes, they were.

XQ. Do you know who they belonged to? [21] A. Yes, I know who they belonged to.

XQ. Who did they belong to? A. Mr. Ash.

XQ. Did he leave these articles in your apartment? A. He had them with him, yes.

XQ. Did he leave them in your apartment? A. Were they left? Yes, they were.

XQ. You also stated the police officers conducted a search later? A. They found a box of .32 caliber shells, is that right? A. That is correct.

XQ. Did these belong to you? A. Yes, they did.

XQ. But you did not own a gun? A. No, I did not.

XQ. Would you mind telling me what you were going to do with the .32 caliber shells? A. They were left there,

they were in my possession, I won't say they belonged to me. They were left in my possession by Mr. Ash at the time.

XQ. You are now saying they did not belong to you? A. Well, they say possession is nine-tenths of the law.

XQ. I am not interested in the law. I want to know [22] whether or not these shells belong to you? A. No, they did not belong to me, they were in my possession.

XQ. That is your answer to that question now? A. That is right.

XQ. How many police officers were there, sir? A. Four, I believe.

XQ. Did all four of them take you down to the station? A. I don't think so. I think one officer remained in the apartment.

XQ. Did they give you a reason for taking you down to the station? A. Suspicion of carrying a gun.

XQ. Is that the only charge? A. That is the only charge that I know of.

XQ. I think you mentioned something about some money, Mr. Painten, I did not quite get it all, tell me again what you said about money? A. Yes. They had a sum of money, $930-odd, that was in my apartment. This money was taken by the officers at the time of the search, along with the other articles, and as I say, this was on a Saturday. That following Monday morning I appeared in court. That money was returned to me when I was bailed out.

[23] XQ. Were you employed at the time, Mr. Painten? A. Self-employed.

XQ. What was your occupation? A. Laundramat.

XQ. You owned a laundramat or operated a laundramat? A. I was a partner in a laundramat.

XQ. Who was your partner? A. Michael Binkiewicz.

XQ. Was Mr. Binkiewicz also a co-defendant in the action which is— A. That is correct.

XQ. How long had you owned that laundramat? A. Well, I would say, negotiations were made for it in January.

XQ. 1958? A. The early part of February, that is right.

XQ. Is it your usual practice, Mr. Painten, to carry such large sums of money on your person or in your apartment? A. Well, I had made a loan previous to that time, and I did have that sum of money as a result of that loan, that particular loan, a loan of $1,000 I had made.

XQ. But the money was returned to you, is that correct? A. That is correct.

[24] XQ. You stated you were brought into court on Monday. Tell me what transpired there? A. There was probable cause held on the Grand Jury, for the Grand Jury, and bail set at $5,000.

XQ. Were you able to raise bail? A. Yes, I was.

XQ. You were subsequently released? A. I was released Monday morning, yes.

XQ. Were you ever brought to trial on these charges? A. I believe these same charges in Suffolk County were nol prossed in April of 1958.

XQ. You stated, Mr. Painten, that the guns that were abandoned from your apartment and also the shells were subsequently admitted into evidence at your trial on this charge of armed robbery? A. In Middlesex County, that is right.

XQ. Are you certain of that? A. Quite positive, yes.

XQ. Did you see the guns displayed in the court room? A. Yes, I did, what I could see of them.

XQ. Did you see the shells displayed in the court room, Mr. Painten? A. I saw the exhibit.

XQ. Was it a box of shells or single— [25] A. They were both.

XQ. Now, Mr. Painten, there were four defendants in this trial, is that correct? A. That is correct.

XQ. And evidence was introduced against each, individually and severally, severally and together, is that correct? A. Yes.

XQ. Now are you able to state categorically these weapons were introduced in evidence, were introduced against you? A. I could say that, yes.

XQ. Have you read the transcript of your trial, sir? A. I have.

XQ. Could you point out where in this transcript it says the guns were introduced against you? A. Well, testimony was given to the fact that the guns were taken from my apartment. There was also testimony given by the co-defendant Bratkon that there were guns that were in my possession, so I would assume that they were presented in evidence against me and against the other defendant, also.

XQ. The same applies for the shells, is that correct? A. I would say so, yes.

Mr. Davis. I have no further questions.

[26] The Court. All right.

Mr. Nordlinger. May I ask just a few more questions of this witness?

The Court. All right.

Redirect Examination

Q. [By Mr. Nordlinger] Mr. Painten, when you were taken out of the apartment and after the entry that has been discussed, you were taken to the police station, you stated? A. That is correct.

Q. And now, sir, while you were taken to the police station or at the police station or at any time prior to your being taken into it on the charges of possession of these weapons, were you questioned about the robbery of the Marlboro Bank? A. No.

Q. Are you certain of this? A. Positively. No.

Q. Can you state for us when is the first time anybody questioned you about the robbery of the Marlboro Bank? A. When I was arrested in March, around March 23rd, 24th, 1958.

Q. A couple of weeks after this entry, is that right? A. Yes, about three weeks.

[27] Q. Now, sir, it is true that you have had the transcript of the trial in your possession at the prison until you delivered it to me, is that right? A. Up until about a year ago, a year and a half ago.

Q. Have you read all of this transcript? A. I have read it, yes.

Q. Would you say that the transcript accurately represents all of the testimony and all of the proceedings during that trial? A. To the best of my recollection, I would say Yes.

Mr. Nordlinger. I have no further questions of this witness, your Honor.

The Court. All right. Is there anything else?

Mr. Davis. There is nothing else.

Mr. Nordlinger. Your Honor, we have nothing further to present on these allegations from the petitioner's side.

The Court. All right.

Mr. Davis. I do have some witnesses I can call, your Honor.

The Court. All right.

[28] EMMETT F. MCNAMARA, *Sworn*

Direct Examination

Q. [By Mr. Davis] Would you state your full name, please? A. Emmett F. McNamara.

Q. Your occupation, sir? A. I am a detective of the Boston Police Department.

Q. What is your assignment Division? A. I am assigned to District 4, South End, Back Bay, at the moment.

Q. Calling your attention to the early part of 1958, were you so employed? A. I was a plainclothes officer working out of the South End, District 4.

Q. Now at some time during 1958, the early part thereof, did you have occasion to come in contact with the petitioner, Mr. Painten? A. I did, sir.

Q. Give this Court the circumstances surrounding this, to the best of your recollection. A. To the best of my recollection, one evening I was traveling along Dartmouth Street towards Columbus Avenue with my partner, Herbert Maxwell, in an unmarked police car. In front of us was a Ford [29] sedan. I believe it was a two-door 1951 Ford sedan. There were two men seated in the front seat.

Q. Did you recognize the two? A. Not at this time. We were stopped at a light at Columbus Avenue. Across Columbus Avenue, there is a liquor store, on the right-hand side. We observed this car cross the intersection and pull up alongside the liquor store. One man got out. We stayed on the other side of Columbus Avenue and watched him.

Q. Let me interrupt you for one second. Was there something about this car or the occupants thereof that caused you to observe them more carefully? A. Well, our routine function is to be on the lookout, for a rash of liquor store holdups at the time, and other holdups, at the time. Both men seated in the car were wearing black soft hats. To me it did not look right. As a result, I figured I would give them a little surveillance. One man got out at the liquor store, went in and went up to the counter. It was a winter night. There was mounds of snow on the sidewalk. The car stayed outside with the motor running. [30] The man as he walked in the liquor store was plainly visible to

me, although I was across the street. I had a photograph in my breast pocket of my suit. I glanced at it, put it back. I stated to my partner, "That looks like this fellow," his name was on the back of the photograph, Donald Painten.

Q. Did you have more than one photograph on you at that time? A. In other pockets, but this particular picture was the only picture I had in this pocket.

Q. Could you tell the Court how it happened you had this photograph on you? A. About a week prior to this, I went upstairs to the detective room in Station 4, and on a desk I saw a photograph with just the name on it. I was curious. I made a phone call to Police Headquarters. I learned who this man was. I put it in the suit I had on, at the time, for future reference if I needed the photograph, routine police work.

Q. Fine. A. I then, while this man was making the purchase, I crossed the intersection because of the Ford, it [31] continued on, moved away and went up towards the Back Bay Station and turned around. We became a little more suspicious and followed the car. As the man turned around and looked at me, recognized me, he took off in a burst of speed, going back in the other direction. I swung the car around. We continued on.

Q. Did you give chase? A. We gave chase, the siren was going. We went up Appleton Street, down Chandler Street, I believe, back out Clarendon Street. We finally caught up with the car at the Gulf Station on Columbus Avenue and Berkeley Street and approached the car. I recognized the driver.

Q. Who was the driver? A. A man named George Ash. I told him to get out of the car. He did. I asked him, we could talk to each other, if we met in the street, what did he take off for? He stated, "You scared me."

Q. This was George Ash talking? A. "You scared me." That is George. In the car I could see a pizza on

the floor and a couple of chickens, they had fallen off the seat, [32] I imagine. We conversed with him for a couple of minutes and allowed him to go on his way. There was nothing wrong. I let him go on his way. He stayed there while I moved the cruising car toward Parker Square. Upon entering Parker Square, in the rear view mirror, I then noticed he turned the car around on Columbus Avenue and went back in the other direction. I got back in the neighborhood of the liquor store, and went in there. I showed the photograph to the man in the liquor store, asked him if he had ever seen this man. The clerk stated, "Sure, that is Mr. Painten, he was just in here and bought a bottle of liquor." I asked him, "Do you know where he lives?" He says, "Well, he lives on Dartmouth Street, 120-124, one or two buildings up before the barroom. I then moved the cruising car in the back of these buildings, a parking lot, and looked around. There was the Ford sedan we had chased earlier. Then I went to the doorbells on the street. I found Donald Painten or Mr. Painten's name on a doorbell. Maxwell and I were alone at the time. I knew Ash [33] and had heard of Painten.

Q. Before you go any further, tell us how you knew George Ash? A. I knew George Ash to have been involved in holdups in the past, and that he has done prison terms.

Q. Had you arrested him before? A. I don't believe I ever arrested him but I made myself known to him and he to me.

Q. I think you stated earlier, sir, there had been a rash of holdups, is that correct? A. There had been.

Q. Specifically, now, what places had been held up? I think you mentioned liquor stores? A. Liquor stores are quite common. There have been some loan company holdups in the daytime.

Q. As a result of what transpired, did you feel in your mind maybe George Ash and his companion had been involved in some way or other? A. In my own mind, I felt they were a couple of likely suspects for the holdup that had happened that day.

Q. This is your reason for going to Dartmouth Street, going to the apartment. Continue, sir. A. Knowing these two, I called for another car. Another car showed up with two other plainclothesmen. [34] I told one of them, Paul Rufo, "We are going up to see some fellows up in an apartment, if we can find them, will you watch the back of the building?" He left and went around the back of the building. We went up and found the apartment designated on the mailbox. I rapped on the door, and a voice said, "Who is it?" I said, "Police officers." The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, "Will you wait a minute?" I said, "Sure." He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter.

Q. Could you tell us who was in the apartment? A. George Ash was seated at the table. There is a room on the right, a bedroom, a woman was there. Mr. Painten was in the kitchen. Off to the left there is a pantry and stove. There was another man, I can't recall his name, but I had seen him around.

Q. There were three people in the apartment? A. Three men and a woman. So I approached him, sitting [35] at the table. George was there again. I asked who lived there. Painten volunteered it was his apartment. I made some inquiries. There was money on the table, not much, there was maybe $20, $30. In Ash's pocket, I noticed a bulge. I put my hand in his pocket. I found a handful of money, a couple of hundred.

Q. Was this a large sum? A. A couple of hundred dollars. It was $180, $200, in tens, and 20s. But it was crammed in the pocket, it was not folded. At that time I opened the window and hollered to Rufo, "Come on up, everything is all right." He hollered up to me, "Someone threw something out the window." A couple of minutes later he came in the apartment. There were two windows in the kitchen. We opened one of the windows and on the fire escape, below, was a bag. I believe Rufo went out the window, went down and brought the bag back in the window, opened it up and there was .45 and .32 bullets for both guns, they were wrapped in wax paper, it was a brown paper bag.

[36] Q. These were found on the fire escape? A. On the fire escape, the fire escape below. As a result of my suspicions, I told them they were under arrest for suspicion of a holdup on a loan company. I then looked in the bedroom, looked around. There was a bed there.

Q. Before you go further, I want to clear it up in my own mind, you told them they were under arrest for suspicion of holdup? A. That is right.

Q. At this time you went into the bedroom to look around? A. Yes. In the bedroom, I looked in the closet. I believe I found a box of bullets somewhere in that bedroom. There was a bed there with a box spring mattress on top. I lifted the mattress. In the bottom of the mattress there was approximately $900, $1,000, spread out neatly under the mattress. I asked Mr. Painten whose money was this? He stated that it was his. I asked him where did he get it. He stated he had gotten a loan from some finance company, I believe it was in Chelsea or Revere, on that side of the city. As a result, I [37] believe we counted the money in front of him and put it with the other property that we had.

Q. Was there any investigation made as to whether or not he had in fact borrowed this money from a loan company? A. I did not make one.

Q. You did not know of your own personal knowledge whether such investigation was made? A. I believe he had a transaction, to the best of my recollection, at some company over there, for that amount of money, either the day before or a couple of days prior, but I am not sure.

Q. Now after you found the money, did you take them down— A. Disposed with other officers, other officers arrived as a result of the radio call, plainclothesmen and uniformed men, and the men were removed to District 4. I don't recall whether I went with them at that time, but I did return to the station sometime later with property, money, guns, other evidence, and they were booked for suspicion, as I recall, they were booked for suspicion of armed robbery of the loan company. Later they were subsequently in routine fingerprinted and photographed and went to court the following day or the following Monday. [38] Q. Tell us what happened to this money after you left? A. When I went home, this money went into the Captain's office and it was examined by FBI agents and other officers, which I learned when I came back to work.

Q. Was this money subsequently returned to Mr. Painten? A. This money was.

Q. Do you know whether or not the FBI agents took the serial numbers of this money? A. I do know that.

Mr. Davis. I have no further questions.

Cross-Examination

XQ. [By Mr. Nordlinger] Mr. McNamara, you stated to the Court you had some suspicion of this petitioner's involvement in holdups prior to your entering his apart-

ment that night, is that right? A. As I get your question, you mean particularly him?

XQ. Yes. A. I would say No.

XQ. So he was not under suspicion for holdups at that time? A. Not he alone. My function is, there is plenty of other fellows around the South End that could possibly have gone into the same category, if they come across my path. [39] These two happened to be in front of me. My suspicions were aroused at that particular time.

XQ. Did you have any particular reason to suspect Mr. Painten was involved in a robbery at that time? A. Well, I knew of the description of the men in the holdup, as a result of information received on our daily manifold. As I recall, they fitted the description; two white men, one tall, one a little shorter.

XQ. Would you say your suspicions would give you reasons to have picked up Painten when you saw him get out of the car and enter the liquor store? A. No, no, sir, not at that time.

XQ. He was not sufficiently under suspicion to apprehend him at that time for any particular crime, was he? A. I felt I would keep him under surveillance for a while, under the circumstances, the car with a motor running outside a liquor store, a man going inside. I had a photograph of the man.

XQ. That concerns a possibility of a robbery of a liquor store, which you thought might occur? A. That is correct.

XQ. At that time the car stopped, he got out of the car to enter the liquor store. You were behind him. [40] Did you think you had any reason to arrest him for any particular crime?

The Court. Before he went to the liquor store?

Mr. Nordlinger. That is right, your Honor.

The Witness. At that time, I say No.

XQ. Now, sir, did you observe Mr. Painten or did any information come to you in the moments after you saw Mr. Painten enter the liquor store, did any information come to you to give you reason to arrest Mr. Painten for a crime or for suspicion of a crime? A. No, but I could add to that.

XQ. Pardon me? A. No, to that question, but I would like to add to that question.

XQ. Just a moment now. You go ahead, let me give you the opportunity now. State what you want concerning that. A. If Painten had not stopped, gone into the liquor store, I would have approached the car and stopped them and made some inquiries, and I believe I would have taken them to Station 4 on suspicion of that holdup, that day.

XQ. You did follow the Ash car or Ash driving the car? A. This is after he let Mr. Painten off.

XQ. You did not take Ash down to the station? A. No, sir.

[41] XQ. You had no intention at the time you let Ash go in the Gulf Station, you had no intention of taking him to the station at that time? A. I felt he would lead me back to Painten, and that is what he did.

XQ. Was that the purpose of your letting him go? A. Yes, sir.

XQ. When Mr. Davis was examining you, you stated you watched in the rear view mirror, you were leaving the scene, suddenly you saw in your rear view mirror, suddenly you saw he turned around, that is what brought you to follow him, is that correct? A. I know, yes, sir.

XQ. Had you observed when you arrived back at the address on Dartmouth Street, Painten's name was right on the door? A. On the mailbox.

XQ. You stated you saw it. Had you made any effort to locate Mr. Painten before that date? A. No, sir.

XQ. What reason did you have for locating Mr. Painten that evening? A. When I started my tour of duty, I did not have [42] Mr. Painten in particular mind, it is when I saw him in the car in front of me that they became suspicious to me.

XQ. What reason did you have for going to his house that evening? A. I felt he might be involved with Ash in holdups.

XQ. But you did not feel he was involved to such a degree you wanted to arrest him, when he left the car and went into the liquor store? A. No, sir.

XQ. Something happened between the time he entered the liquor store until you arrived back, from stopping George Ash, you arrived back in the apartment, something happened evidently to give you reason to feel Painten had been involved in a holdup. Can you tell us what that is? A. Ash's actions.

XQ. By "Ash's actions," you mean fleeing the scene where you approached his vehicle? A. That is correct.

XQ. Now, sir, when you went to the apartment on Dartmouth Street, did you make any effort either by radio or did you consult with anybody in your police department [43] regarding the obtaining of a warrant to enter that household? A. No, sir.

XQ. Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant? A. Yes, sir.

XQ. Can you state to the Court what that was? A. Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes.

XQ. You stated while you were being examined by Mr. Davis, that you knew Painten over a period of time because of his involvement in some holdups, is that right? A. No, I did not say that.

XQ. Well, where did you come in contact with Mr. Painten then? A. I observed Mr. Painten in the vicinity of a cafe on Columbus Avenue, standing outside, inside of the bar many times and in the vicinity of the South End, and in company with other people whom I did know.

XQ. So at no time did you ever have a case involving Mr. Painten for robbery or armed robbery? A. I don't believe I ever had him for another crime.

[44] XQ. Before this? A. No, sir.

XQ. And so, regarding Mr. Painten's background, personal background, as far as your knowledge is concerned, is it fair to say that it gave you no reason to feel he should be involved in holdups at the time of this entry? A. I felt that he could be involved in recent holdups.

XQ. But you had no information he had been involved in any holdups before that time? A. I had no information from anyone.

XQ. Were you familiar with his record? Do you know whether or not there were armed robberies on his record before that time? A. No, I am not familiar with his record to know what it was. I know he had one as a result of the photograph.

XQ. I am sorry. A. I knew he had one. What it is—

XQ. What, sir? A. He had a record.

XQ. For what, sir? A. What it was, I don't know. I don't recall, but I know he had one because I had a photograph in my pocket, [45] taken at police headquarters.

XQ. You did not know whether or not he had any record at all for armed robbery or robbery? A. I don't recall what his past was.

XQ. Now, sir, when you entered the apartment, did you ask permission of Mr. Painten to conduct a search of the premises? A. I don't believe I did.

XQ. You did, sir, conduct a search while you were there, or the officers accompanying you conducted it? A. I was in the search of the apartment.

XQ. When you first approached the apartment house, the entry, was there a door prior to ascending the stairs to the third floor, was there an outer door to the street? A. The double glass doors, and then a stairway upstairs.

XQ. Did you ring the bell? Was there a bell for you to ring to have the door open to gain admission? A. I did not ring the bell.

XQ. Now, how did you gain admission? A. I went up and knocked on the door.

XQ. How did you gain admission to the outer door? A. They were open.

[46] XQ. They were not locked? A. No, sir.

XQ. Now, sir, if you recall, how long prior to the time of this entry and this search, how long before this did these holdups occur that were on your mind that evening? A. Sometime during the day.

XQ. That very day? A. As I recall, yes, sir.

XQ. When you heard about these holdups and realized they were part of your business, did you then have this petitioner Painten under suspicion? A. No, sir.

XQ. Did you have George Ash under suspicion? A. No, sir.

XQ. At the time you saw George Ash and Painten together in the car by that liquor store, did you have them under suspicion for these finance company robberies? A. No, sir.

XQ. May I ask you, sir, what gave you reason for the search of George Ash's car in which you stated you found the chickens and the pizza in the car, did you find any weapons in the car when you stopped it, incidentally? [47] A. No, sir.

XQ. Did you frisk the driver, George Ash? A. No, sir.

XQ. You did not look for a weapon on his person? A. I could see he had none.

XQ. When he returned to the South End, as you might expect, for the company of Painten whom he had left just

earlier, what gave you reason to feel you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car? A. When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is living there, these things in my mind lead me to arrest him for that holdup.

XQ. That is the only basis, the reason for arresting him for the finance company holdup? A. Because of their records and association and the [48] officer coming in, discovering the guns.

XQ. Did he discover the guns before you entered the building? A. No, sir.

XQ. Before you entered the apartment? A. No, sir.

XQ. Rufo's discovery of something being thrown out the window had nothing to do with your entering the building or entering the apartment, did it? A. No, sir.

Mr. Nordlinger. I have no further questions.

Redirect Examination

Q. [By Mr. Davis] I want to tie up a couple of loose ends, Mr. McNamara. Stop me if I am wrong. Stopping in front of the liquor store, the subsequent chase of the car driven by Mr. Ash, upon entering the apartment and having one fellow discover the guns, all of these factors were taken into consideration by you and warranted a suspicion of robbery, is that correct? A. That is correct.

Mr. Davis. Thank you. I have no further questions.

[49] Mr. Nordlinger. Mr. McNamara, when you agree to this question, are you stating again that the discovery of the guns on the fire escape influenced your decision to enter that apartment?

The Witness. No, sir.

Mr. Davis. He did not say that.

The Court. He said it influenced his decision to make the arrest, as I understood it. Is that correct, Mr. Officer?

Mr. Nordlinger. I have no further questions.

The Court. You say your discovery of the guns influenced your decision to make the arrest. Mr. Nordlinger asked you if it influenced your decision to enter the apartment. Mr. Davis asked you if it influenced your decision to make the arrest.

The Witness. To make the arrest, yes. They were found after we entered the apartment.

The Court. All right. O.K.

Mr. Nordlinger. No further questions.

Mr. Davis. I have one further witness, Lieutenant Crowley.

The Court. Go ahead.

[50] CORNELIUS J. CROWLEY, *Sworn*

Direct Examination

Q. [By Mr. Davis] State your full name, please? A. Cornelius J. Crowley.

Q. You are a Lieutenant of the State Police? A. Detective Lieutenant.

Q. What is your assignment, sir? A. Now?

Q. Are you assigned to headquarters? A. Yes, I am.

Q. What was your assignment back in 1958? A. I was a detective assigned to the office of the District Attorney, Middlesex County.

Q. Sometime during the early part of 1958, did you have occasion to come in contact with the petitioner, Donald Painten? A. Yes, sir.

Q. Tell the Court how this came about? A. Yes, sir. I was conducting an investigation of a robbery of the Peo-

ple's National Bank in Marlboro. I was at Marlboro Police Headquarters. I requested my headquarters in Boston to locate Mr. Painten and to bring him to Marlboro, if he wanted to come, for the [51] purposes of identifying him as a possible robber.

Q. Let me interrupt you for a second. Do you know or could you remember the date of your request? I know it is rather hazy. A. I think it was around the 21st of March, 1958.

Q. If that is true, then it would be subsequent to the events which have been testified to by Officer McNamara? A. A couple of weeks later.

Q. Continue, please?

The Court. Wait a minute.

[The preceding questions and answers of Lieutenant Crowley are read.]

Q. Now, Lieutenant Crowley, did you know about the events which had transpired in Boston at the time you made the request? A. Yes, sir.

Q. Was this part of the basis for your making this request? A. Yes, sir.

Q. Did you know about the money that had been discovered? A. Yes, sir.

Q. Did you know about the guns that had been discovered? A. Yes, sir.

Q. Would you continue with your story, please? A. The money that had been taken from under the mattress, [52] and which he had agreed was his money, all of the serial numbers had been taken by FBI agents, and the first time that they made an examination of the list as against the list of marked money in the Marlboro National Bank, they found two bills in that list of marked money. Then a day later they made another examination of the same list, with the same list of marked money and they found several other bills.

Q. This is prior to your making the request to see Mr. Painten, also, is that right? A. Yes, sir, this is in between.

Q. The incident in Boston? A. The defendant had been picked up in Boston, arrested and the money had been taken back to him, and so forth.

Q. Fine. A. The guns were wrapped up in a piece of cellophane or that wax paper used in a kitchen, and among the things they took out of the house, his home, was a box of wax paper. The ends, the torn edges of the wax paper matched exactly the torn edges of the box in his closet or his pantry. For those reasons, I wanted him to come out and be identified, if possible.

[53] Q. All of this took place, you say, around the 20th, the 21st of March? A. Yes, sir.

Q. Prior to this, Lieutenant Crowley, had there been an arrest of another suspect in the Marlboro Bank robbery? I refer to Mr. Bratkon, Lieutenant. A. Yes, there had been an arrest, yes.

Q. Prior to this, prior to your talking, making the request to see Donald Painten, had you interrogated Mr. Bratkon, Lieutenant? A. Yes, I had.

Q. Could you tell us, if you remember, sir, whether or not during the interrogation of Mr. Bratkon, he made statements indicating the petitioner here, Donald Painten? A. Yes, sir.

Q. This is now one of the factors you considered in asking to see Mr. Painten, is that correct? A. Yes, sir.

Q. Did Mr. Painten in fact go to Marlboro—was it, or Hudson? A. Marlboro.

Q. Did he in fact go to Marlboro to see you? A. Yes, sir.

[54] Q. Did you interrogate him there? A. Yes, sir.

Q. Would you give us the substance of that interrogation, if you remember? Before you answer that, Lieuten-

ant, may I ask you this? Did you advise Mr. Painten of his rights at that time? A. No, sir.

Q. Was it in your mind at this time, if you remember, to make an arrest? A. No, sir.

Q. You merely wanted to interrogate him, is that correct? A. That is right. I talked about the robbery and about his whereabouts. He told me that on the day of the robbery he was at the laundramat on Appleton Street. He told me that he had put down $50 for a deposit on the laundramat, he was going to work it with his father. He told me that he spent some of the time between 11 and 2, whatever time was involved in the robbery, at Kelley's Spoft Life Cafe. He denied being present at the robbery. I brought the various people in the bank to identify him.

Q. Did you at this time confront the petitioner with [55] the information concerning the money found in his apartment? By that I mean the serial numbers being the same as those taken from the People's National Bank in Marlboro? A. Yes, I did.

Q. He denied it? A. He denied it, could not understand how the money could get there.

Q. He could offer no explanation? A. I also told him at the Federal Reserve Bank they had sent the money out to the People's National Bank within a week, as I remember it, before the robbery of the bank, and that it was at least odd that the several bills were found together and separated in the whole bunch of bills that he had. The robbery of which Mr. McNamara spoke was a robbery that was just under $1,000. He explained that he had made a loan at some credit union in Chelsea or Revere. I checked that loan company. I found that he had made a loan a long time before.

Q. A long time before? A. That is my memory.

Q. Now, in view of all of this evidence that you confronted [56] him with, he still denied that he had anything

to do with the People's National Bank robbery? A. He denied all knowledge of the guns. He denied that they were George Ash's guns. He denied completely knowledge of any kind having to do with the guns or ammunition.

Q. He denied that the guns were his and they did not belong to George Ash, also? A. That is right.

Q. Have you been sitting in the court room all morning? A. Yes, sir.

Q. Did you hear Mr. Painten testify earlier the guns belonged to George Ash? A. Yes, sir.

Q. What else did you confront the petitioner with at this time, if you remember? A. I confronted him with the pieces of paper, the box of paper, and the sheet of paper.

Q. You stated where it was torn, it seemed to match the wax paper that was in the box? A. Yes, sir.

Q. You stated this wax paper was paper taken from the petitioner's apartment? [57] A. Yes, sir. There were many, many more questions and answers that escape me at the moment.

Q. Let me ask you this, Lieutenant? Did you confront the petitioner as a result of your investigation, with the co-defendant Bratkon? A. Yes, sir.

Q. Did he deny knowing Mr. Bratkon? A. Yes, sir.

Q. He said he did not even know Bratkon? A. That is right.

Q. Now as a result of the interrogation of the petitioner, Lieutenant, did you subsequently arrest him? A. Yes, sir.

Q. Did you arrest him that very day? A. The next day, a continuing proposition, after I finished talking with him, I kept him all of the time.

Q. He never left you before he was arrested, is that right? A. No.

Q. But it was as a result of this interrogation and other extrinsic evidence that you did arrest him, is that right? A. That is right.

Q. Were you present at the trial, Lieutenant? A. Yes, sir.

[58] Q. In fact, the guns that were mentioned earlier, were they introduced in evidence? A. Yes, sir.

Q. There was also some evidence of a .32 caliber bullet being introduced, do you recall this? A. I remember the introduction of several individual bullets, yes. One of them was a .32, I am reasonably sure.

Q. Do you remember whether or not Mr. Painten had a gun? A. No, I don't.

Q. Was there a car ever involved in the course of this investigation with the registration number, 129510 for 1958, I believe it was a 1954 Dodge? A. I don't remember. If I am not mistaken—

Q. You don't remember? A. Not from that description of it. I have a memory of a Dodge. Where it came into the picture—is that a stolen car, is that the one that was stolen?

Q. That is correct. A. Yes, I remember that now.

Q. Do you remember—I realize that this is some time ago—and if I may say here, your Honor, I was not able to locate the agent who gave this testimony at the trial, this is why I am trying to exhaust Lieutenant Crowley's memory—

[59] The Court. All right.

Q. Do you remember the testimony concerning the stolen car by the Special Agent who searched the car?

The Court. The FBI Agent?

Mr. Davis. It was an FBI Agent, yes, your Honor.

The Witness. Was that Dailey?

Mr. Davis. Bailey, yes.

The Court. Portland, Maine.

Mr. Davis. He did not have too much time.

The Witness. Bailey. I remember him having searched the car. He found a .32 bullet in the car, in the stolen car. It did not belong to the owner of the car.

Q. There was also a .45 caliber bullet introduced in evidence. Do you remember the circumstances surrounding that? A. I think I do. The holdup car pulled up to the side of the road and there was a switch, and some bullets fell out of his pocket, on the ground. They switched drivers, as I remember it. The car took off. The man in the house came out and picked up a bullet or two that had fallen out of it. I forget whether he identified the man or not.

Q. At the time, Lieutenant Crowley, was there evidence [60] concerning the money found in the petitioner's apartment in connection with the serial numbers that had been money stolen from the People's National Bank? A. Yes, sir.

Q. Who introduced that evidence, do you remember? A. Let me see, I think it was Special Agent Condon.

Q. Did you testify at the trial, Lieutenant? A. Yes, sir.

Q. Could you give us the substance of his testimony, if you remember it, in narrative form?

Mr. Davis. According to my brother, he will stipulate what is in the transcript is correct.

The Court. All right.

Mr. Davis. I have no further questions.

The Court. O.K.

Mr. Nordlinger. Just a couple of questions, your Honor. I am not going to prolong this.

The Court. All right.

[61] *Cross-Examination*

XQ. [By Mr. Nordlinger] First of all, sir, you gave some testimony regarding the bank, the money in the bank in Marlboro, and so on. I want to ask you, briefly—

The Court. Let me ask you this, before you ask the Lieutenant any questions, I thought the second part of this

hearing was in regard to the allegations of the search of the apartment. Frankly, Mr. Davis wandered off to some extent. The materiality of it escapes me, on some of it, but go ahead.

Mr. Nordlinger. All right, sir.

The Court. I am not saying you cannot ask any questions you want. The hearing was addressed to the two paragraphs. I don't think the Lieutenant has much—

Mr. Nordlinger. I don't think—

The Court. What do you have in mind?

Mr. Davis. There was that, there was an allegation the money was seized from the petitioner's apartment. Also, the guns were introduced into evidence at the trial, the People's National Bank. Officer McNamara was not involved and Lieutenant Crowley was. [62] It was through him I had to get in the items seized in the apartment. They were in fact introduced in evidence. There is nothing in the transcript.

The Court. I don't think you better challenge the fact the bills were introduced in evidence.

Mr. Davis. There was nothing in the transcript to indicate how the bills were obtained.

Mr. Nordlinger. The petitioner has asked me to call to the Court's attention the serial numbers were introduced, and not the physical bills, the serial numbers.

The Court. All right.

Mr. Nordlinger. Your Honor, I have no further questioning of this witness.

The Court. All right.

Mr. Nordlinger. At this time—I am sorry, I do not know whether the Commonwealth has finished.

Mr. Davis. We have no further witnesses.

The Court. All right.

Mr. Nordlinger. If your Honor please, at this time I would like to make a request of your Honor, and I believe

my brother counsel for the Commonwealth would like to join in this request. Rather than get [63] involved in an argument on all the merits of this petition, we would like to have time to draw up a memorandum to submit to your Honor on this.

The Court. How much time do you want?

Mr. Nordlinger. I am reminded of what I saw in a court room a couple of days ago, the attorney asked for the maximum time. I would like to have at least ten days to do this.

The Court. Name the time. Talk to your brother a minute. Maybe you can agree on that. Have you got a time?

Mr. Nordlinger. Your Honor, if possible, we would like to have thirty days.

The Court. January 28th or February the 1st, Friday.

Mr. Nordlinger. January 28th should do it.

Mr. Davis. I will do that, your Honor, yes, I will.

The Court. January 28th or February 4.

Mr. Davis. Try February 4.

Mr. Nordlinger. All right, your Honor.

Mr. Davis. Your Honor, this is to be limited to what we argued this morning?

The Court. Right.

[Adjourned.]

CERTIFICATE

I, Edward J. Grace, Official Reporter in the United States District Court, do hereby certify that the foregoing transcript from Pages 1 to 63, inclusive, constitutes to the best of my skill and ability a true and accurate transcript of my shorthand notes taken in the above-entitled action.

EDWARD J. GRACE

Opinion.

March 31, 1966

CAFFREY, D.J.

Petitioner Donald M. Painten was tried by a jury in the Superior Court of the Commonwealth of Massachusetts and convicted of conspiracy to steal property, the theft of one automobile, and armed robbery, masked and disguised, of the Peoples National Bank, Marlboro, Massachusetts. He was sentenced to twenty years in the Massachusetts Correctional Institution at Concord on the bank robbery conviction, ten years for the automobile theft, to be served concurrently with the twenty year sentence, and two years on the conspiracy conviction, the two years to take effect from and after the expiration of the other sentences. He is now serving these sentences.

Painten's conviction was affirmed by the Supreme Judicial Court of Massachusetts in an opinion reported at 342 Mass. 740 (1961). Thereafter he filed a petition for a writ of error in the Supreme Judicial Court. The petition was denied after a preliminary hearing. Petitioner subsequently filed the instant writ of habeas corpus in this court.

Petitioner alleges eight separate assignments of error which he feels establish that his imprisonment is illegal and in violation of the Fourteenth Amendment. It appears that all of these contentions have been raised before the state court either on appeal or in petitioner's writ of error.

By agreement of counsel the case was initially submitted to this Court for decision on the basis of a portion of the record from the Middlesex Superior Court. Thereafter, *sua sponte,* the Court ordered the parties to file a complete state court record. Still later, after a review of an 1161-page transcript of the trial held in Middlesex Superior Court, this Court *sua sponte* ordered an evidentiary-type hearing with reference to two of Painten's contentions, (1) that he had been prejudiced by the admission at the

trial of articles seized by the police in the course of an illegal search of his apartment, and (2) that he had been denied equal protection of the law on the basis of his confinement in a prisoner's cage in the Superior Court courtroom. This opinion will first consider those of Painten's contentions which are resolvable on the basis of the state court record and will conclude with consideration of the two contentions as to which evidence was offered in this court.

Painten's first assignment of error is that the trial judge erred in failing to grant his motion for bills of particulars. The Supreme Judicial Court thoroughly considered this point and held that the indictments were in the language of the statute and that they were sufficient, fully, plainly, substantially, and formally, to set out the charges against him. There was no denial of federal rights in this ruling.

Painten also contends that the amendment in the middle of the trial of the indictment charging him with larceny of an automobile denied him his right to know before trial the essential components of the charge against him. The amendment merely changed the name of the automobile owner to Elora G. Trump from that of her husband John C. Trump. This point was also fully considered by the Supreme Judicial Court, which held that the amendment did not prejudice the defendant. There was no denial of federal rights in this ruling.

The next assignment of error is that the trial judge erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to guilty on some counts of the indictment in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a state's witness immediately after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or reward

of a sentence based on his degree of cooperation. There are numerous state and federal decisions holding that a co-defendant who has pleaded guilty is a competent witness even though he has not been sentenced. See *II Wigmore, Evidence,* sec. 580 (3rd ed. 1940). There was no denial of a federal right in allowing the co-defendant to testify.

Painten's next assignment of error is that "The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the grand jury." It is difficult to understand how this action could have infringed Painten's constitutional rights. The co-defendant who was removed from the jail pleaded guilty to the charge during the trial and turned state's evidence. Painten does not allege that the interrogation of the co-defendant was carried out in such a way that the co-defendant's constitutional rights were violated. He does not allege that the co-defendant was coerced or threatened in any manner during his interrogation. In fact, Painten alleges no facts whatsoever which could possibly give rise to any violation of his constitutional rights. He is not entitled to relief on this ground of his petition.

Petitioner's next assignment of error is that during the trial the questioning of one witness elicited testimony that Painten had been in prison. It also appears that during the instruction to the jury the judge referred to the fact that Painten had been an inmate of the Massachusetts Correctional Institution. Petitioner argues that since Massachusetts law provides that a defendant's prier criminal record shall not be disclosed to the jury when the defendant does not testify, and since Painten did not take the stand at his trial, the admission of this testimony relating to his prior imprisonment was a denial of equal protection of the laws.

The transcript of the trial reveals that while Painten's counsel was cross-examining Bratkon, the co-defendant who had pleaded guilty, the following occurred:

Q. Prior to that, when had you last seen him?
A. Like I said, prior to that I seen him in jail.
Q. I asked you when?
A. Around '54. I imagine it was then.

A few moments later the following colloquy took place between the trial judge and the witness:

The Court: When did you last see him before January '58?
Witness: In jail, Your Honor.
The Court: What?
Witness: In jail.
The Court: When was that?
Witness: '54-'55—around there. I don't know exactly the time.

Counsel for Painten made no motion to strike this testimony at any point in the trial; nor did he ever request the trial judge to instruct the jury to disregard the testimony. See *Commonwealth* v. *Walter Edward Early,* Mass. Adv. Sheets (1965) 1303. Under these circumstances, it cannot be said that petitioner was denied equal protection of the laws.

Petitioner next contends that "the trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial." Specifically, petitioner relies on (1) the trial judge's statement, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . ."; and (2) what the petitioner characterizes as a completely erroneous recollection of a witness' answer by the trial judge in his instruction.

The transcript of the trial reveals that at the conclusion of the charge the erroneous reference to Painten as the man who had been convicted of rape was called to the judge's attention during a conference at the bench. The trial judge then instructed the jury that the records referred to were Bratkon's conviction of the rape of two persons and were offered to impeach his credibility. This corrective charge removed any prejudice which may have resulted to Painten from the jury charge.

As to the contention that the judge stated an erroneous recollection of a witness' testimony in his charge to the jury, it should be noted that the judge had charged the jury that it was their recollection of the evidence that should govern their deliberations, not that of the judge. Furthermore, there was no objection to the portion of the charge which petitioner now claims was erroneous.

This was a long trial, involving four defendants and a number of charges. The trial lasted twelve days. The judge can hardly be expected to have remembered every detail of the evidence. Upon a fair reading of the entire charge it cannot be said that the trial judge so misled the jury as to deprive petitioner of due process of law.

Petitioner's next assignment of error is that articles which had been seized during an illegal search of his apartment were admitted into evidence against him. Before resolving Painten's contentions with regard to illegal search and seizure, the contention of the Commonwealth that Painten is not in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) must be considered. The Supreme Court held in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) that the exclusionary rule of *Mapp* did not apply retroactively to convictions which had become final by the date of its decision in *Mapp* (June 19, 1961). The record proves that Painten's conviction was affirmed by the Supreme Judicial Court of the Common-

wealth of Massachusetts on June 9, 1961. Since the time within which Painten could petition for a writ of certiorari had not expired when Mapp was handed down, his conviction was not final as that term is defined in *Linkletter* v. *Walker, supra,* [at 622 n. 5]* and, therefore, evidence obtained through an illegal search and seizure was not admissible in Painten's trial in state court, even though the trial occurred in 1958.

As a corollary it follows that at the time of the trial in Superior Court, *Wolf* v. *Colorado,* 338 U.S. 25 (1949) was still believed by the bar to be good law. For this reason no waiver of Painten's rights under *Mapp* may properly be inferred from the failure of the record to establish an objection by his counsel on the grounds of the illegal search to the admission of the articles about whose admission he now complains. *U.S. ex rel Angelet* v. *Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd. on other grounds, *Angelet* v. *Fay,* 381 U.S. 654 (1965); *United States* v. *LaVallee,* 334 F.2d 331 (2d Cir. 1964); *Dillon* v. *Peters,* 341 F.2d 337 (10th Cir. 1965). It follows that Painten's claim of a violation of his constitutional rights by the illegal search and seizure must be decided on the merits.

On the basis of the state court record and the evidentiary-type hearing held in this Court, I find that on Saturday night, March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, were on patrol in an unmarked police car. About 8:30 p.m., they were traveling along Dartmouth Street behind a Ford sedan occupied by two men in soft, black hats. At the intersection of Dartmouth Street and Columbus Avenue, the sedan crossed Columbus Avenue and pulled up in front of a liquor store while the police car stopped at the traffic light. Since there had recently been a rash of

*See Order, *infra,* p. 59.

liquor store holdups, Officer McNamara kept on eye on the sedan and saw petitioner Painten get out of the car and enter the store. McNamara confirmed his identification from a "mug" shot of Painten which he had in his pocket. The sedan moved slowly up the street, turned around, and was returning as McNamara, his suspicions aroused by the car's movement, crossed the intersection and pulled up before the liquor store. When the driver of the sedan saw Officer McNamara in the unmarked police car he took off down the street with a burst of speed. McNamara wheeled the squad car around and gave chase, using his siren.

After chasing the sedan for several blocks McNamara overtook and stopped it. As he approached the car he recognized the driver, George Ash, whom he knew had been convicted of holdups in the past and had served time in prison. McNamara ordered Ash out of the car and asked him why he had run. Ash said McNamara had "scared" him. McNamara could see that Ash was not carrying a weapon. He looked in the car and after some conversation let Ash go on his way, in the hope that Ash would lead him to Painten. Ash returned in the direction of the liquor store.

McNamara returned to the liquor store and showed Painten's picture to the clerk, who told him that Painten lived in a nearby apartment building. He then drove to the address given by the clerk and in a parking lot behind the apartment building found the car that Ash had been driving. A check of the front door disclosed Painten's name under one of the doorbells. Knowing Painten and Ash, and the reputation of this apartment building, McNamara returned to his car and put in a radio call for two more police officers.

McNamara was interested in Painten and Ash because he considered them likely suspects for a loan company robbery that had taken place earlier on the same day.

McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were "two white men, one tall, one a little shorter." As Officer McNamara candidly admitted, there were "plenty of other fellows around the South End that could possibly have gone into the same category" as Painten and Ash if they had come across his path.

When Officers Megnia and Rufo arrived at the apartment building in response to his call, McNamara told them he and Maxwell were "going up to see some fellows up in an apartment, if we can find them," and sent Rufo to watch the rear of the building. McNamara, Maxwell and Megnia then approached the apartment building, found the outer door unlocked, and entered. Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked "Who's there?" McNamara showed his badge and replied, "It's the Boston Police. We'd like to talk to you." Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment.

Inside, in the kitchen, they found George Ash and a woman identified as Doris Painten. Painten stated that the apartment was his. Noticing a bulge in Ash's pocket McNamara stuck his hand into it and found about $200.00 in ten and twenty dollar bills stuffed in the pocket. There was some conversation between McNamara and the occupants of the apartment. No search of Painten's person or his apartment took place at this time.

In the meantime, from his vantage point behind the building, Officer Rufo had seen someone open a window in Painten's apartment and drop a bag onto the fire escape. The two kitchen windows of Painten's apartment faced the back of the building. On the third floor level, the fire escape extended to a point on the wall about midway between these two windows. On the second floor level, however, the fire escape extended to the edge of the building, so that it was directly under the corner window of Painten's kitchen, the window from which the bag was dropped. The bag fell to the second story fire escape and landed with a metallic clang. As soon as the window was closed, Officer Rufo went around to the front of the building, entered, went up to Painten's apartment, into the kitchen, and told McNamara "They threw a bag out the window." About three minutes had passed since McNamara's entry into Painten's apartment.

While McNamara, Maxwell and Megnia kept an eye on Painten and Ash, Rufo raised the venetian blind, opened the window, stepped out onto the fire escape, went down the ladder to the second floor level, picked up the brown paper bag and started to rip it open. He saw the muzzle of a .45 and immediately returned to Painten's apartment. In the kitchen McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about

the bag. He asked whether anyone knew anything about the pistols and Painten responded that he knew nothing about them. McNamara then placed Painten under arrest "for suspicion of a holdup on a loan company," and proceeded to make a thorough search of the apartment.

During the search, McNamara discovered and seized a box of .32 caliber shells found on a kitchen shelf and about $980.00 found under the mattress in Painten's bedroom. Painten was still in the apartment when these articles were seized. After the arrest more police were called in and Painten and the others were taken to Station 4. Some time after Painten had been taken to the station, exactly how long does not appear in the record, except that it was later in the same evening, the police found and seized a roll of waxed paper. The roll of waxed paper, the sheets of waxed paper, the paper bag, the guns, the ammunition, and the money were all taken to the station. Over the weekend, FBI agents made a list of the serial numbers of the money found under Painten's mattress.

At Painten's trial in state court, all these items except the money were introduced into evidence. There was testimony that the bag with the guns and ammunition had been thrown from Painten's apartment and recovered from the fire escape. There was testimony that the roll of waxed paper came from Painten's apartment and that the sheets of waxed paper in which the guns had been wrapped were torn from this roll. There was testimony that the box of .32 caliber bullets was found in Painten's apartment. The serial numbers of some of the money taken from Painten's apartment were read into evidence and there was testimony that these serial numbers matched those of bills that had been taken in the robbery of the Peoples National Bank. There was testimony that the serial numbers had been taken from money found in Painten's apartment.

I rule, on the basis of this record, that Officer McNamara did not have probable cause to arrest Painten when he went

to Painten's apartment and sought entrance thereto. All that he knew when he knocked on Painten's door was that Painten had some sort of a record and that he had seen Painten in a car with Ash who he knew had a record for holdups. I find that the officers went to the apartment intending to ask Painten a few questions and then to arrest him "on suspicion of the loan company job." In so finding I have in mind the statement by Officer McNamara at the hearing here that if Painten had not gone from the car into the liquor store he would have asked him and Ash a few questions and then "I believe I would have taken them to Station 4 on suspicion of that holdup that day." I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview.

It follows that the entrance into Painten's apartment without a warrant and absent any probable cause to arrest any occupant thereof was "under color of their police authority" (*Johnson* v. *United States*, 333 U.S. 10, 16 (1948)) and there was no "valid basis in law for the intrusion." Id., p. 17.

Since the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry. *Johnson* v. *United States*, *supra*, at p. 16. "'A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from' what is dug up subsequently." *Ker* v. *California*, 374 U.S. 23, at 41 n.[12],* quoting *United States* v. *DiRe*, 332 U.S. 581, 595 (1948).

I rule that the guns, bullets, sheets of waxed paper, roll of waxed paper, paper bag, and the serial numbers of the bills obtained during the course of the search were all ob-

*See Order, *infra*, p. 59.

tained in violation of Painten's constitutional rights and that their use as evidence at his trial was a denial of his constitutional rights.

In view of this disposition of the allegation of illegal search I do not reach Painten's contentions with regard to the "cage" located in the Middlesex Superior Court courtroom. In any event, these contentions will be moot on retrial since the cage has been removed from the Middlesex Superior Court courtroom.

The petition for writ of habeas corpus is allowed and the Commonwealth of Massachusetts is directed to either bring Painten to a new trial on these charges within sixty days from the filing of this opinion or to discharge him from custody.

ANDREW A. CAFFREY,
U. S. District Judge

Order.

March 31, 1966

In conformity with Opinion of the Court filed this date, it is ORDERED:

1. The judgment of conviction on the basis of which petitioner is in custody is vacated.

2. That the Commonwealth of Massachusetts bring petitioner to a new trial on these charges within sixty days from this 31st day of March, 1966, or discharge him from custody.

By the Court,
HOPE K. CONNELL
Deputy Clerk

ANDREW A. CAFFREY
United States District Judge

Motion for Stay.

[Filed April 5, 1966.]

Now comes the respondent in the above-entitled cause and moves that this Court order a stay of the order commanding the Commonwealth of Massachusetts to bring the petitioner to trial within sixty days or to discharge him from custody, pending the appeal of the respondent to the United States Court of Appeals for the First Circuit.

By its attorney,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

April 7 1966 Motion Denied
ANDREW A. CAFFREY
District Judge

Notice of Appeal.

[Filed April 5, 1966.]

Notice is hereby given that the Commonwealth of Massachusetts, respondent in the above-entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from a Judgment by Justice Caffrey entered on March 31, 1965 ordering that the Commonwealth of Massachusetts bring petitioner to a new trial within sixty days

from 31st day of March, 1966, or discharge him from custody.

By its attorney,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

Motion for Issuance of Certificate of Probable Cause under Rule 87 (A) and Section 2253 of Title 28.

[Filed April 5, 1966.]

Now comes the respondent in the above-entitled action and moves that this Honorable Court issue a Certificate of Probable Cause to permit it to appeal to the Court of Appeals from the order to bring the petitioner to trial within sixty days or to discharge him from custody.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

Motion allowed April 7 1966
AAC D.J.

Order.

April 11, 1966

The Opinion filed herein on March 31, 1966 is amended as follows:

On page 8, line 10, by inserting after the word *supra* "at 622 n. 5."

On page 16, line 7, by striking "5" after 41 n. and substituting "12" therefor.

ANDREW A. CAFFREY
U. S. District Judge

[fol. 60]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

On April 13, 1966, the Commonwealth of Massachusetts, appellant, filed a Motion for Stay Pending Appeal.

Thereafter, on April 21, 1966, an order was entered granting the stay pending appeal and providing that Donald M. Painten, appellee, may move for admission to bail in the District Court.

Thereafter, on May 3, 1966, appellee filed a Motion to Have Case Remanded to District Court for Hearing as to Bail.

Thereafter, on May 6, 1966, without objection, an order was entered remanding the case to the District Court for the limited purpose of hearing and entertainment of a motion for bail pending appeal.

Thereafter, on May 31, 1966, supplemental record on appeal was filed containing motion to be admitted to bail and opinion and order of the District Court denying same.

Thereafter, on July 7, 1966, appellee filed a motion to be admitted to bail which was denied by order of Court on July 20, 1966.

Thereafter, on September 13, 1966, this cause came on to be heard, and was fully heard, by the Court, Honorable Bailey Aldrich, Chief Judge, and Honorable Edward M. McEntee and Honorable Frank M. Coffin, Circuit Judges, sitting.

[fol. 61]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6720

COMMONWEALTH OF MASSACHUSETTS, Respondent, Appellant,

v.

DONALD M. PAINTEN, Petitioner, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[252 F.Supp. 851]

Before Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges.

Willie J. Davis, Assistant Attorney General, with whom Edward W. Brooke, Attorney General, was on brief, for appellant.

Louis M. Nordlinger for appellee.

OPINION OF THE COURT—November 10, 1966

ALDRICH, Chief Judge. Petitioner was convicted in the state court of armed robbery and various connected offenses, and was given extensive sentences. His conviction was affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 1961, 342 Mass. 740. Thereafter he sought a writ of error in the state court, raising, for the first time, the matters now before us. The writ was dismissed. Having thus exhausted his state remedies, he filed a petition for habeas

corpus in the district court. The writ was granted, *Painten* v. *Commonwealth*, D. Mass., 1966, 252 F.Supp. 851, and the Commonwealth appeals.

[fol. 62] It is necessary for us to consider only one of petitioner's contentions. In upholding the writ on this ground we rely upon the findings of the district court, which appear at 252 F.Supp. 855-56, except for the recitation of a conversation, more precisely set out hereafter, that took place when the police knocked at the petitioner's door. Very briefly, two policemen, knowing of a holdup but having no substantial clues, came across petitioner and one Ash, and followed them to petitioner's apartment. Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime. After arranging for plainclothesmen to station themselves at the back of the building, one of the uniformed officers then knocked on the door. He testified as follows:

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter. . . . I asked who lived there. Painten volunteered it was his apartment."

After entering the apartment, the police noticed a bulge in Ash's pocket, and removed some $200 in crumpled bills. They then called to the plainclothesmen to come up, and received the response that "someone" had thrown "something" out the window. This information led to the discovery on the fire escape on a floor below of a paper bag containing two pistols and some cartridges.

[fol. 63] Petitioner was thereupon arrested; the apartment was searched, and a large amount of currency was found under a mattress. At petitioner's trial the guns and bills were introduced in evidence.

Although these events took place in 1958 it is conceded that petitioner is in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 1961, 367 U.S. 643.

This case falls over the permissible line that we recently sought to delineate in *Robbins* v. *MacKenzie,* 1966, 364 F.2d 45, *cert. den.* 10/17/66. In that case the district court found, on adequate evidence, that no search was intended. We held that where the police, having reasonable suspicion but not probable cause, knocked on a door and asked to talk, and had no other purpose, they were entitled to treat an invitation to enter as voluntary consent. Our discussion need not be repeated, but we distinguished cases where the purpose of the police was not merely to talk, but to make a search.

In the case at bar the police sought entry without stating their purpose. If this was a request to make a search, acquiescence when police knock and exhibit a badge is not true consent to a search, as the cases cited in Judge Coffin's dissenting opinion in *MacKenzie* make clear. The Commonwealth's own evidence indicates that a search was in fact intended. In addition, the district court found that the police purpose was to arrest petitioner, although they had no warrant or ground for obtaining one. The Commonwealth disputes this appraisal of the testimony, and the correctness of the court's finding as to purpose, but its own police officer, with commendable candor, testified as follows:

> "Q. Was it your opinion . . . something was going on in that household to give you reason to enter the household without a warrant?" A. "Yes, sir . . . [fol. 64] in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes."

This suggests to us a proposed investigation surpassing mere dialogue. When asked a second time his reason for seeking to enter, the officer testified,

> ". . . . now we have them [Ash and petitioner] together in the apartment and the holdup of the loan company is in my mind now . . . and I find out he is living there, these things in my mind lead me to arrest him for that holdup."

It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful.

It follows that, as the court said in *Hobson* v. *United States,* 8 Cir., 1955, 226 F.2d 890, at 894, "The defendant's action in throwing the package was not voluntary but was forced by the actions of the police," and since their actions were improper, the police were not entitled to the fruits. The state could not use the guns, even as probable cause, if they were such, to justify their subsequent conduct in making an arrest, or the search in which they discovered the money. *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 482-84.

Affirmed.

[fol. 65] COFFIN, Circuit Judge (concurring). While I concur with my brothers in the result reached by them, I differ as to the path taken to reach it. I would link the inadmissibility of the guns and bullets not to the officers' request for entry, whether lawful or not, but rather to the later, unauthorized exercise of dominion over petitioner's apartment when an officer used it as a conduit of convenience for seizing the bag on the fire escape. That

the officers could have obtained the bag without invading petitioner's premises does not cure the defect. The mere fact that officers had previously gained access to the apartment, even if lawfully, and were conversing in it with petitioner did not, in my view, provide another officer with license to use it as a thoroughfare.

Without the guns and bullets contained in the bag, there was no probable cause for any arrest or subsequent search.

What troubles me about the opinion of my brothers is their reasoning that, since the officers harbored an improper purpose, their knocking on the door and identifying themselves was also "improper" and immunized from use any objects jettisoned into public view and beyond petitioner's premises. I would not go so far as to say that such preliminaries could shield evidence later discovered if it were obtained without going on the premises of a suspect. Such a holding, it seems to me, would open the door unnecessarily to claims of immunity buttressed on routine and proper investigatory actions of police. Even if the request to enter in this case was improper, it by no means follows that that conduct alone was so shocking as to taint evidence virtually handed to the officers on a silver platter or, in this case, on an iron grating.

[fol. 66]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—Entered November 10, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Enter: Aldrich, Ch. J.

Thereafter, on November 17, 1966, appellant filed a motion for stay of mandate.

Thereafter, on November 18, 1966, appellee filed a motion to be admitted to bail.

Thereafter, on November 22, 1966, a Memorandum and Order of Court was entered giving appellant, Commonwealth of Massachusetts, five business days to elect to (1) retry appellee to commence not later than January, 1967, or (2) seek certiorari in which event appellee will be admitted to bail.

Thereafter, on November 29, 1966, appellant filed an election to apply for certiorari; and thereupon an order was entered staying mandate.

[fol. 67] Thereafter, on November 30, 1966, an order was entered directing that appellee be admitted to bail pending proceedings in the Supreme Court of the United States

upon petition for a writ of certiorari, the amount of the bail to be determined by the District Court, after hearing, in the light of all factors it deems pertinent to the extent of the risk.

[fol. 68] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 69]

SUPREME COURT OF THE UNITED STATES

No. 929—October Term, 1966

MASSACHUSETTS, Petitioner,

v.

DONALD M. PAINTEN.

ORDER ALLOWING CERTIORARI—February 20, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Table of Contents.

Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	2
Argument	5
I. The decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter	5
II. The Court of Appeals has decided a federal question in a way which conflicts with applicable decisions of the Supreme Court of the United States	7
Conclusion	11
Appendix	12

Table of Authorities Cited.

Cases.

Abel v. United States, 362 U.S. 217 (1960)	11
Chapman v. United States, 346 F. 2d 383 (1965)	6
Commonwealth v. Ballou, 1966 Mass. Adv. Sh. 835	10
Commonwealth v. Binkiewicz, 342 Mass. 740 (1961)	2
Commonwealth v. Lawton, 348 Mass. 129 (1964)	10
Henry v. United States, 361 U.S. 98 (1959)	10
Jones v. United States, 362 U.S. 257 (1960)	11
Ker v. California, 374 U.S. 23 (1963)	8, 10
Mapp v. Ohio, 367 U.S. 643 (1961)	7

Painten v. Commonwealth, 252 F. Supp. 851 (1966) 2
Robbins v. MacKenzie, 364 F. 2d 45 (1966) 6, 7
United States v. Russian, 192 F. Supp. 183 (1961) 8
United States v. Walker, 190 F. 2d 481 (1951) 11

STATUTES, ETC.

U.S. Constitution, Fourth Amendment 2, 10
28 U.S. Code, § 1254 (1) 1
28 U.S. Code, § 2241 (a) 2
28 U.S. Code, § 2254 2

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts (App. *infra*, p. 12) is reported at 252 F. Supp. 851; and the opinion of the United States Court of Appeals for the First Circuit (App. *infra*, p. 24), dated November 10, 1966, has not yet been reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The jurisdiction of this court is invoked under 28 U.S. Code § 1254 (1).

Questions Presented.

1. Was there an illegal entry into the apartment of the respondent?
2. Was there an illegal search of the apartment of the respondent?
3. Does the respondent have standing to assert suppression of abandoned property as evidence?

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

The respondent, Painten, filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (R.A. 2-7). The petition was brought pursuant to 28 U.S. Code § 2241 (*a*) and 28 U.S. Code § 2254. Painten sought to set aside a conviction in the State Court for armed robbery and related offenses. His convictions had been affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 342 Mass. 740 (1961). The writ was granted, *Painten* v. *Commonwealth*, 252 F. Supp. 851 (D.C. Mass. 1966), and the Commonwealth appealed. The United States Court of Appeals for the First Circuit affirmed the decision. *Commonwealth* v. *Painten.*

The facts material to the consideration of the questions presented are as follows:

On or about March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, observed the respondent and one George Ash in an automobile in the South End of Boston (R.A. 24). George Ash was known to the officers personally and Painten was identified from a "mug" shot in the pocket of Officer McNamara (R.A. 24-25). Both men were known to have records (R.A. 26, 33). There had been a rash of liquor-store holdups and a loan-company holdup that day (R.A. 24, 26). The officers decided to keep the respondent and George Ash under surveillance (R.A. 24).

The two men stopped in front of a liquor store and the respondent got out of the car and entered the store (R.A. 24). Ash, who was driving the car, saw the officers and took off down the street with a burst of speed. The officers gave chase, using the siren. After several blocks the officers overtook the car (R.A. 25). Ash was ordered out of the car and asked why he had run. His reply was that "McNamara had scared him" (R.A. 25). The officers looked in the car and, after some conversation, let Ash go on his way, in the hope that Ash would lead them to Painten (R.A. 26).

The officers discovered that Painten had an apartment on Dartmouth Street, in Boston's South End (R.A. 26). They went to the apartment building and found the car that Ash had been driving (R.A. 26). A check of the front door of the apartment building disclosed respondent's name under one of the bells (R.A. 26). At this point, Officer McNamara put in a radio call for two more officers (R.A. 27).

When the other officers arrived, McNamara informed them that they were "going up to see some fellows in an

apartment, and asked them to watch the front and rear of the building" (R.A. 27). Officers McNamara and Maxwell then proceeded upstairs and knocked on the respondent's door. Respondent answered the door, opening it only a few inches, and asked: "Who's there?" McNamara showed his badge and replied: "It's the police. We'd like to talk to you." Respondent asked if they would wait a minute. McNamara replied that they would, and respondent closed the door. While the door was closed, McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later, respondent opened the door. McNamara and Maxwell entered the apartment (R.A. 27).

Inside the apartment the officers found George Ash and a woman (R.A. 27). Respondent stated that the apartment was his. There was some conversation between McNamara and the occupants of the apartment. No search of respondent's person or his apartment took place at this time (R.A. 27-28).

About three minutes after McNamara and Maxwell entered the apartment, the officer stationed in the rear came up and said: "They threw a bag out the window" (R.A. 28). The bag had landed on the fire-escape directly under the corner window of respondent's kitchen, the window from which the bag was dropped. The officer went down the fire-escape to the second-floor level and picked up the brown paper bag (R.A. 28). In the kitchen the bag was opened by McNamara and he discovered, wrapped in three sheets of waxed paper, a .32-caliber automatic and a .45-caliber revolver, together with nine .32-caliber bullets and thirteen .45-caliber bullets scattered about the bag (R.A. 28). Respondent stated that he knew nothing about them, but at the evidentiary hearing on his petition for writ of habeas corpus he admitted that the guns belonged to

George Ash (R.A. 19). McNamara then placed the respondent under arrest and proceeded to search the apartment (R.A. 28).

During the search of the apartment the officers seized a box of .32-caliber shells found in the kitchen and about $980 found under the mattress in respondent's bedroom. Later a roll of waxed paper was seized because the torn edge matched the edge of the wax paper in which the guns had been wrapped (R.A. 28, 37-38). Over the weekend FBI Agents made a list of the serial numbers of the money found in the apartment. The serial numbers of some of the bills matched those of bills that had been taken in the robbery of the People's National Bank in Marlboro, Massachusetts (R.A. 37).

The articles seized and the serial numbers of the bills were introduced at respondent's trial for bank robbery.

Argument.

I. The Decision of the Court of Appeals is in Conflict with the Decision of Another Court of Appeals on the Same Matter.

The Court of Appeals has ruled that the police, knowing of a crime and knowing that the respondent and his companion were suspicious characters, set out to arrest and search the men in the hope that evidence would develop. In reaching its decision, however, the court seems to have disregarded completely the actions of the police and relied solely on what the officers had in their minds at the time they entered the apartment of the respondent.

It is reasonable to assume that the police would not have gone to the apartment of the respondent if they did not have some suspicion about his connection with a crime. This is probably true in most instances where a police offi-

cer goes to the home of a person with a reputation similar to that of the respondent.

A similar situation existed in the case of *Chapman* v. *United States*, 346 F. 2d 383 (9th Cir. 1965). In that case the FBI was investigating the theft of certain property from a national bank. When they went to the home of the defendant they only knew that she was a former employee of the bank in the section where the documents were missing and that she had refused to return her key upon request. It was not until they entered the house and saw ashes in the fireplace and other papers on the floor which were from the bank that the defendant was arrested and a search made of the premises. The court ruled that, because of what occurred after the officers reached the home of the defendant, they had probable cause to arrest her. Thus the search that followed was valid.

In the case at bar, events occurred after the officers arrived at the apartment of the petitioner which gave them probable cause to arrest petitioner. The police discovered guns that the respondent had attempted to discard, and the discovery was made without a search. It must be noted that no arrest was made until the discovery of the guns. If, in fact, the officers intended to arrest the respondent, there was ample time to do so before the discovery of the guns.

Despite the distinction drawn between *Robbins* v. *MacKenzie*, 364 F. 2d 45 (1st Cir. 1966), and the case at bar, the Court of Appeals for the First Circuit seems to have decided this case in conflict with its own prior opinions. In *Robbins* the police knew that the defendant had been convicted of a crime similar to the one under investigation. They went to the rooming house where the defendant was staying and stationed one officer at the back door. The other officer was allowed to enter, and, upon entry, asked

the defendant to come to the station for interrogation. The District Court found that this request was not an arrest. It was not until the officer saw the wristwatch on the defendant's arm and a gold coin fall out of the pocket of a companion that they were placed under arrest and a search was made. The court distinguished the cases by saying that in *Robbins* the purpose of the police was to talk, and in the case at bar the purpose was to make a search. While the police may have said before entering the apartment what they were thinking or had in mind doing, they clearly did not do any more than the officers did in *Robbins*. If we are to decide a case based solely on the thinking of the police as opposed to overt acts, then the law of search and seizure is thrown wide open to prevarication and requires the employment of hindsight on the part of the court. It would appear that the court in this decision was telling the police "don't think or your subsequent actions will be invalid."

II. The Court of Appeals has Decided a Federal Question in a Way which Conflicts with Applicable Decisions of the Supreme Court of the United States.

The Supreme Court of the United States has not laid down a "fixed formula" for the application of the Constitutional prohibition against unreasonable searches and seizures. The only requirement or standard set down is one of reasonableness. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the

concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Ker* v. *California*, 374 U.S. 23, 34 (1963).

In holding that the police, knowing of a crime and knowing that the petitioner and his companion were suspicious characters, set out to arrest and search the men in the hope that evidence would develop, the Court of Appeals applied a subjective standard. Such a standard has never been set down by the Supreme Court of the United States. In fact, some courts have stated specifically that a subjective standard is not the test. In the case of *United States* v. *Russian*, 192 F. Supp. 183 (D.C. Conn. 1961), the court held that the state of the arresting officers' minds is not the criterion whereby to determine the making of an arrest; the proper standard should be an objective one.

Applying an objective standard, the actions of the respondent and the police clearly indicate that the respondent was not under arrest at the time of entry into the apartment and that said entry was made with the consent of the respondent. The respondent went to the door, saw the officers, and asked them if they would wait a minute. They agreed, and respondent closed the door (R.A. 27). Clearly, if the officers intended to arrest respondent or to make a forcible entry, this was the time to do it. They would certainly realize that, by allowing respondent to close the door, he would be able to escape or dispose of evidence. Still, the officers waited patiently until the door was reopened by respondent (R.A. 27).

The Court of Appeals based its decision on the testimony of Officer McNamara. The pertinent testimony is as follows:

> "Q. Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant?

"A. Yes, sir.

"Q. Can you state to the court what that was?

"A. Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes." (R.A. 32.)

"Q. When he returned to the South End, as you might expect, for the company of Painten whom he had left just earlier, what gave you reason to feel that you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car?

"A. When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is hiding there, these things in my mind lead me to arrest him for that holdup.

"Q. That is the only basis, the reason for arresting him for the finance company holdup?

"A. Because of their records and association and the officer coming in, and discovering the guns." (R.A. 34-35.)

The last answer of Officer McNamara clearly indicates that it was not his intention to arrest respondent until after the discovery of the guns. However, assuming that he did, the record still shows that he did not arrest respondent until probable cause was obtained.

To apply the standard set down by the Court of Appeals would be to hold also that probable cause must exist be-

fore the police go to talk to a suspect, rather than before they arrest him. Clearly, this is not the rule. Probable cause must exist before an arrest without a warrant can be made. See *Henry* v. *United States,* 361 U.S. 98 (1959).

Pursuant to the direction of the Supreme Court of the United States *in Ker* v. *California, supra,* the Commonwealth of Massachusetts has established workable rules regarding searches and seizures, and these rules do not violate the Fourth Amendment of the Constitution of the United States. These rules do not include a subjective standard in determining probable cause for arrest of an accused. In fact, the idea has been rejected. ". . . the Commonwealth should not be conclusively bound or limited by the officer's choice of words made subjectively in the active execution of his duties." *Commonwealth* v. *Lawton,* 348 Mass. 129, 132 (1964).

More recently, the Commonwealth reiterated its position on the arresting officer's state of mind in the case of *Commonwealth* v. *Ballou,* 1966 Mass. Adv. Sh. 835. At page 839 the court states:

> "The captain's testimony that he considered the defendant to be under arrest before coming within five feet of him and before a word was spoken or any physical restraint imposed was an opinion on a matter of law which does not estop the Commonwealth or foreclose the courts. *Commonwealth* v. *Lehan,* 347 Mass. 197, 205, 207. *Commonwealth* v. *Lawton,* 348 Mass. 129, 132-133. The trial judge in effect so ruled, and correctly."

If we apply the objective standard as adopted by the Commonwealth, the entry into the apartment of the respondent was legal and the search, after the arrest, was also valid.

With regard to the guns discovered by the police, the respondent does not have standing to complain of or assert their suppression as evidence, because they were abandoned and discarded by the respondent. See *Abel* v. *United States,* 362 U.S. 217, 240-241 (1960); *Jones* v. *United States,* 362 U.S. 257, 261 (1960); *United States* v. *Walker,* 190 F. 2d 481, 483 (2d Cir. 1951).

Conclusion.

The Commonwealth of Massachusetts has never before sought certiorari in any case involving constitutional rights. However, the effect of the Painten decision shifts the test of illegal searches and seizures from one of overt acts to one of the thoughts of the police; it radically changes the law of search and seizure as exponded by the highest court in the land. If certiorari is to be denied in this case, the Painten decision will become a dangerous and far-reaching precedent for all law enforcement officials across the nation. For these reasons the Commonwealth of Massachusetts respectfully asks that certiorari be granted.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,
By WILLIE J. DAVIS,
Assistant Attorney General.

[Appendix follows.]

Appendix.

Opinion of the District Court for the District of Massachusetts.

March 31, 1966

CAFFREY, D.J.

Petitioner Donald M. Painten was tried by a jury in the Superior Court of the Commonwealth of Massachusetts and convicted of conspiracy to steal property, the theft of one automobile, and armed robbery, masked and disguised, of the Peoples National Bank, Marlboro, Massachusetts. He was sentenced to twenty years in the Massachusetts Correctional Institution at Concord on the bank robbery conviction, ten years for the automobile theft, to be served concurrently with the twenty year sentence, and two years on the conspiracy conviction, the two years to take effect from and after the expiration of the other sentences. He is now serving these sentences.

Painten's conviction was affirmed by the Supreme Judicial Court of Massachusetts in an opinion reported at 342 Mass. 740 (1961). Thereafter he filed a petition for a writ of error in the Supreme Judicial Court. The petition was denied after a preliminary hearing. Petitioner subsequently filed the instant writ of habeas corpus in this court.

Petitioner alleges eight separate assignments of error which he feels establish that his imprisonment is illegal and in violation of the Fourteenth Amendment. It appears that all of these contentions have been raised before the state court either on appeal or in petitioner's writ of error.

By agreement of counsel the case was initially submitted to this Court for decision on the basis of a portion of the record from the Middlesex Superior Court. Thereafter, *sua sponte*, the Court ordered the parties to file a complete

state court record. Still later, after a review of an 1161-page transcript of the trial held in Middlesex Superior Court, this Court *sua sponte* ordered an evidentiary-type hearing with reference to two of Painten's contentions, (1) that he had been prejudiced by the admission at the trial of articles seized by the police in the course of an illegal search of his apartment, and (2) that he had been denied equal protection of the law on the basis of his confinement in a prisoner's cage in the Superior Court courtroom. This opinion will first consider those of Painten's contentions which are resolvable on the basis of the state court record and will conclude with consideration of the two contentions as to which evidence was offered in this court.

Painten's first assignment of error is that the trial judge erred in failing to grant his motion for bills of particulars. The Supreme Judicial Court thoroughly considered this point and held that the indictments were in the language of the statute and that they were sufficient, fully, plainly, substantially, and formally, to set out the charges against him. There was no denial of federal rights in this ruling.

Painten also contends that the amendment in the middle of the trial of the indictment charging him with larceny of an automobile denied him his right to know before trial the essential components of the charge against him. The amendment merely changed the name of the automobile owner to Elora G. Trump from that of her husband John C. Trump. This point was also fully considered by the Supreme Judicial Court, which held that the amendment did not prejudice the defendant. There was no denial of federal rights in this ruling.

The next assignment of error is that the trial judge erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to

guilty on some counts of the indictment in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a state's witness immediately after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or reward of a sentence based on his degree of cooperation. There are numerous state and federal decisions holding that a co-defendant who has pleaded guilty is a competent witness even though he has not been sentenced. See *II Wigmore, Evidence,* sec. 580 (3rd ed. 1940). There was no denial of a federal right in allowing the co-defendant to testify.

Painten's next assignment of error is that "The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the grand jury." It is difficult to understand how this action could have infringed Painten's constitutional rights. The co-defendant who was removed from the jail pleaded guilty to the charge during the trial and turned state's evidence. Painten does not allege that the interrogation of the co-defendant was carried out in such a way that the co-defendant's constitutional rights were violated. He does not allege that the co-defendant was coerced or threatened in any manner during his interrogation. In fact, Painten alleges no facts whatsoever which could possibly give rise to any violation of his constitutional rights. He is not entitled to relief on this ground of his petition.

Petitioner's next assignment of error is that during the trial the questioning of one witness elicited testimony that Painten had been in prison. It also appears that during the instruction to the jury the judge referred to the fact

that Painten had been an inmate of the Massachusetts Correctional Institution. Petitioner argues that since Massachusetts law provides that a defendant's prior criminal record shall not be disclosed to the jury when the defendant does not testify, and since Painten did not take the stand at his trial, the admission of this testimony relating to his prior imprisonment was a denial of equal protection of the laws.

The transcript of the trial reveals that while Painten's counsel was cross-examining Bratkon, the co-defendant who had pleaded guilty, the following occurred:

> Q. Prior to that, when had you last seen him?
> A. Like I said, prior to that I seen him in jail.
> Q. I asked you when?
> A. Around '54. I imagine it was then.

A few moments later the following colloquy took place between the trial judge and the witness:

> The Court: When did you last see him before January '58?
> Witness: In jail, Your Honor.
> The Court: What?
> Witness: In jail.
> The Court: When was that?
> Witness: '54-'55—around there. I don't know exactly the time.

Counsel for Painten made no motion to strike this testimony at any point in the trial; nor did he ever request the trial judge to instruct the jury to disregard the testimony. See *Commonwealth* v. *Walter Edward Early,* Mass. Adv. Sheets (1965) 1303. Under these circumstances, it cannot be said that petitioner was denied equal protection of the laws.

Petitioner next contends that "the trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial." Specifically, petitioner relies on (1) the trial judge's statement, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . . "; and (2) what the petitioner characterizes as a completely erroneous recollection of a witness' answer by the trial judge in his instruction.

The transcript of the trial reveals that at the conclusion of the charge the erroneous reference to Painten as the man who had been convicted of rape was called to the judge's attention during a conference at the bench. The trial judge then instructed the jury that the records referred to were Bratkon's conviction of the rape of two persons and were offered to impeach his credibility. This corrective charge removed any prejudice which may have resulted to Painten from the jury charge.

As to the contention that the judge stated an erroneous recollection of a witness' testimony in his charge to the jury, it should be noted that the judge had charged the jury that it was their recollection of the evidence that should govern their deliberations, not that of the judge. Furthermore, there was no objection to the portion of the charge which petitioner now claims was erroneous.

This was a long trial, involving four defendants and a number of charges. The trial lasted twelve days. The judge can hardly be expected to have remembered every detail of the evidence. Upon a fair reading of the entire charge it cannot be said that the trial judge so misled the jury as to deprive petitioner of due process of law.

Petitioner's next assignment of error is that articles which had been seized during an illegal search of his apart-

ment were admitted into evidence against him. Before resolving Painten's contentions with regard to illegal search and seizure, the contention of the Commonwealth that Painten is not in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) must be considered. The Supreme Court held in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) that the exclusionary rule of *Mapp* did not apply retroactively to convictions which had become final by the date of its decision in *Mapp* (June 19, 1961). The record proves that Painten's conviction was affirmed by the Supreme Judicial Court of the Commonwealth of Massachusetts on June 9, 1961. Since the time within which Painten could petition for a writ of certiorari had not expired when Mapp was handed down, his conviction was not final as that term is defined in *Linkletter* v. *Walker, supra,* [at 622 n. 5]* and, therefore, evidence obtained through an illegal search and seizure was not admissible in Painten's trial in state court, even though the trial occurred in 1958.

As a corollary it follows that at the time of the trial in Superior Court, *Wolf* v. *Colorado,* 338 U.S. 25 (1949) was still believed by the bar to be good law. For this reason no waiver of Painten's rights under *Mapp* may properly be inferred from the failure of the record to establish an objection by his counsel on the grounds of the illegal search to the admission of the articles about whose admission he now complains. *U.S. ex rel Angelet* v. *Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd. on other grounds, *Angelet* v. *Fay,* 381 U.S. 654 (1965); *United States* v. *LaVallee,* 334 F.2d 331 (2d Cir. 1964); *Dillon* v. *Peters,* 341 F. 2d 337 (10th Cir. 1965). It follows that Painten's claim of a violation of his constitutional rights by the illegal search and seizure must be decided on the merits.

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* See Order, *infra,* p. 59.

On the basis of the state court record and the evidentiary-type hearing held in this Court, I find that on Saturday night, March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, were on patrol in an unmarked police car. About 8:30 p.m., they were traveling along Dartmouth Street behind a Ford sedan occupied by two men in soft, black hats. At the intersection of Dartmouth Street and Columbus Avenue, the sedan crossed Columbus Avenue and pulled up in front of a liquor store while the police car stopped at the traffic light. Since there had recently been a rash of liquor store holdups, Officer McNamara kept an eye on the sedan and saw petitioner Painten get out of the car and enter the store. McNamara confirmed his identification from a "mug" shot of Painten which he had in his pocket. The sedan moved slowly up the street, turned around, and was returning as McNamara, his suspicions aroused by the car's movement, crossed the intersection and pulled up before the liquor store. When the driver of the sedan saw Officer McNamara in the unmarked police car he took off down the street with a burst of speed. McNamara wheeled the squad car around and gave chase, using his siren.

After chasing the sedan for several blocks McNamara overtook and stopped it. As he approached the car he recognized the driver, George Ash, whom he knew had been convicted of holdups in the past and had served time in prison. McNamara ordered Ash out of the car and asked him why he had run. Ash said McNamara had "scared" him. McNamara could see that Ash was not carrying a weapon. He looked in the car and after some conversation let Ash go on his way, in the hope that Ash would lead him to Painten. Ash returned in the direction of the liquor store.

McNamara returned to the liquor store and showed Painten's picture to the clerk, who told him that Painten lived in a nearby apartment building. He then drove to the address given by the clerk and in a parking lot behind the apartment building found the car that Ash had been driving. A check of the front door disclosed Painten's name under one of the doorbells. Knowing Painten and Ash, and the reputation of this apartment building, McNamara returned to his car and put in a radio call for two more police officers.

McNamara was interested in Painten and Ash because he considered them likely suspects for a loan company robbery that had taken place earlier on the same day. McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were "two white men, one tall, one a little shorter." As Officer McNamara candidly admitted, there were "plenty of other fellows around the South End that could possibly have gone into the same category" as Painten and Ash if they had come across his path.

When Officers Megnia and Rufo arrived at the apartment building in response to his call, McNamara told them he and Maxwell were "going up to see some fellows up in an apartment, if we can find them," and sent Rufo to watch

the rear of the building. McNamara, Maxwell and Megnia then approached the apartment building, found the outer door unlocked, and entered. Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked "Who's there?" McNamara showed his badge and replied, "It's the Boston Police. We'd like to talk to you." Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment.

Inside, in the kitchen, they found George Ash and a woman identified as Doris Painten. Painten stated that the apartment was his. Noticing a bulge in Ash's pocket McNamara stuck his hand into it and found about $200.00 in ten and twenty dollar bills stuffed in the pocket. There was some conversation between McNamara and the occupants of the apartment. No search of Painten's person or his apartment took place at this time.

In the meantime, from his vantage point behind the building, Officer Rufo had seen someone open a window in Painten's apartment and drop a bag onto the fire escape. The two kitchen windows of Painten's apartment faced the back of the building. On the third floor level, the fire escape extended to a point on the wall about midway between these two windows. On the second floor level, however, the fire escape extended to the edge of the building, so that it was directly under the corner window of Painten's kitchen, the window from which the bag was dropped. The bag fell to the second story fire escape and landed with a metallic clang. As soon as the window was closed,

Officer Rufo went around to the front of the building, entered, went up to Painten's apartment, into the kitchen, and told McNamara "They threw a bag out the window." About three minutes had passed since McNamara's entry into Painten's apartment.

While McNamara, Maxwell and Megnia kept an eye on Painten and Ash, Rufo raised the venetian blind, opened the window, stepped out onto the fire escape, went down the ladder to the second floor level, picked up the brown paper bag and started to rip it open. He saw the muzzle of a .45 and immediately returned to Painten's apartment. In the kitchen McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about the bag. He asked whether anyone knew anything about the pistols and Painten responded that he knew nothing about them. McNamara then placed Painten under arrest "for suspicion of a holdup on a loan company," and proceeded to make a thorough search of the apartment.

During the search, McNamara discovered and seized a box of .32 caliber shells found on a kitchen shelf and about $980.00 found under the mattress in Painten's bedroom. Painten was still in the apartment when these articles were seized. After the arrest more police were called in and Painten and the others were taken to Station 4. Some time after Painten had been taken to the station, exactly how long does not appear in the record, except that it was later in the same evening, the police found and seized a roll of waxed paper. The roll of waxed paper, the sheets of waxed paper, the paper bag, the guns, the ammunition, and the money were all taken to the station. Over the weekend, FBI agents made a list of the serial numbers of the money found under Painten's mattress.

At Painten's trial in state court, all these items except the money were introduced into evidence. There was testimony that the bag with the guns and ammunition had been thrown from Painten's apartment and recovered from the fire escape. There was testimony that the roll of waxed paper came from Painten's apartment and that the sheets of waxed paper in which the guns had been wrapped were torn from this roll. There was testimony that the box of .32 caliber bullets was found in Painten's apartment. The serial numbers of some of the money taken from Painten's apartment were read into evidence and there was testimony that these serial numbers matched those of bills that had been taken in the robbery of the Peoples National Bank. There was testimony that the serial numbers had been taken from money found in Painten's apartment.

I rule, on the basis of this record, that Officer McNamara did not have probable cause to arrest Painten when he went to Painten's apartment and sought entrance thereto. All that he knew when he knocked on Painten's door was that Painten had some sort of a record and that he had seen Painten in a car with Ash who he knew had a record for holdups. I find that the officers went to the apartment intending to ask Painten a few questions and then to arrest him "on suspicion of the loan company job." In so finding I have in mind the statement by Officer McNamara at the hearing here that if Painten had not gone from the car into the liquor store he would have asked him and Ash a few questions and then "I believe I would have taken them to Station 4 on suspicion of that holdup that day." I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview.

It follows that the entrance into Painten's apartment without a warrant and absent any probable cause to arrest

any occupant thereof was "under color of their police authority" (*Johnson* v. *United States*, 333 U.S. 10, 16 (1948)) and there was no "valid basis in law for the intrusion." Id., p. 17.

Since the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry. *Johnson* v. *United States*, *supra*, at p. 16. "'A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from' what is dug up subsequently." *Ker* v. *California*, 374 U.S. 23, at 41 n.[12],* quoting *United States* v. *DiRe*, 332 U.S. 581, 595 (1948).

I rule that the guns, bullets, sheets of waxed paper, roll of waxed paper, paper bag, and the serial numbers of the bills obtained during the course of the search were all obtained in violation of Painten's constitutional rights and that their use as evidence at his trial was a denial of his constitutional rights.

In view of this disposition of the allegation of illegal search I do not reach Painten's contentions with regard to the "cage" located in the Middlesex Superior Court courtroom. In any event, these contentions will be moot on retrial since the cage has been removed from the Middlesex Superior Court courtroom.

The petition for writ of habeaus corpus is allowed and the Commonwealth of Massachusetts is directed to either bring Painten to a new trial on these charges within sixty days from the filing of this opinion or to discharge him from custody.

ANDREW A. CAFFREY
U.S. District Judge

* See Order, *infra*, p. 59.

Opinion of the United States Court of Appeals for the First Circuit.

No. 6720.

COMMONWEALTH OF MASSACHUSETTS
RESPONDENT, APPELLANT,
v.
DONALD M. PAINTEN,
PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[252 F.Supp. 851]

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Willie J. Davis, Assistant Attorney General, with whom Edward W. Brooke, Attorney General, was on brief, for appellant.
Louis M. Nordlinger for appellee.

OPINION OF THE COURT.

November 10, 1966.

ALDRICH, *Chief Judge*. Petitioner was convicted in the state court of armed robbery and various connected offenses, and was given extensive sentences. His conviction was affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 1961, 342 Mass. 740. Thereafter he sought a writ of error in the state court, raising, for the first time, the matters now before us. The writ was dismissed. Having thus exhausted his state remedies, he filed a petition for habeas corpus in the district court. The writ was granted, *Painten* v. *Commonwealth*, D. Mass., 1966, 252 F.Supp. 851, and the Commonwealth appeals.

It is necessary for us to consider only one of petitioner's contentions. In upholding the writ on this ground we rely upon the findings of the district court, which appear at 252 F.Supp. 855-56, except for the recitation of a conversation, more precisely set out hereafter, that took place when the police knocked at the petitioner's door. Very briefly, two policemen, knowing of a holdup but having no substantial clues, came across petitioner and one Ash, and followed them to petitioner's apartment. Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime. After arranging for plainclothesmen to station themselves at the back of the building, one of the uniformed officers then knocked on the door. He testified as follows:

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter. . . . I asked who lived there. Painten volunteered it was his apartment."

After entering the apartment, the police noticed a bulge in Ash's pocket, and removed some $200 in crumpled bills. They then called to the plainclothesmen to come up, and received the response that "someone" had thrown "something" out the window. This information led to the discovery on the fire escape on a floor below of a paper bag containing two pistols and some cartridges. Peti-

tioner was thereupon arrested; the apartment was searched, and a large amount of currency was found under a mattress. At petitioner's trial the guns and bills were introduced in evidence.

Although these events took place in 1958 it is conceded that petitioner is in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 1961, 367 U.S. 643.

This case falls over the permissible line that we recently sought to delineate in *Robbins* v. *MacKenzie,* 1966, 364 F.2d 45, *cert. den.* 10/17/66. In that case the district court found, on adequate evidence, that no search was intended. We held that where the police, having reasonable suspicion but not probable cause, knocked on a door and asked to talk, and had no other purpose, they were entitled to treat an invitation to enter as voluntary consent. Our discussion need not be repeated, but we distinguished cases where the purpose of the police was not merely to talk, but to make a search.

In the case at bar the police sought entry without stating their purpose. If this was a request to make a search, acquiescence when police knock and exhibit a badge is not true consent to a search, as the cases cited in Judge Coffin's dissenting opinion in *MacKenzie* make clear. The Commonwealth's own evidence indicates that a search was in fact intended. In addition, the district court found that the police purpose was to arrest petitioner, although they had no warrant or ground for obtaining one. The Commonwealth disputes this appraisal of the testimony, and the correctness of the court's finding as to purpose, but its own police officer, with commendable candor, testified as follows:

> "Q. Was it your opinion . . . something was going on in that household to give you reason to enter the household without a warrant?" A. "Yes, sir . . .

> in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes."

This suggests to us a proposed investigation surpassing mere dialogue. When asked a second time his reason for seeking to enter, the officer testified,

> ". . . . now we have them [Ash and petitioner] together in the apartment and the holdup of the loan company is in my mind now . . . and I find out he is living there, these things in my mind lead me to arrest him for that holdup."

It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful.

It follows that, as the court said in *Hobson* v. *United States,* 8 Cir., 1955, 226 F.2d 890, at 894, "The defendant's action in throwing the package was not voluntary but was forced by the actions of the police," and since their actions were improper, the police were not entitled to the fruits. The state could not use the guns, even as probable cause; if they were such, to justify their subsequent conduct in making an arrest, or the search in which they discovered the money. *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 482-84.

Affirmed.

COFFIN, *Circuit Judge* (concurring). While I concur with my brothers in the result reached by them, I differ as to the path taken to reach it. I would link the inadmis-

sibility of the guns and bullets not to the officers' request for entry, whether lawful or not, but rather to the later, unauthorized exercise of dominion over petitioner's apartment when an officer used it as a conduit of convenience for seizing the bag on the fire escape. That the officers could have obtained the bag without invading petitioner's premises does not cure the defect. The mere fact that officers had previously gained access to the apartment, even if lawfully, and were conversing in it with petitioner did not, in my view, provide another officer with license to use it as a thoroughfare.

Without the guns and bullets contained in the bag, there was no probable cause for any arrest or subsequent search.

What troubles me about the opinion of my brothers is their reasoning that, since the officers harbored an improper purpose, their knocking on the door and identifying themselves was also "improper" and immunized from use any objects jettisoned into public view and beyond petitioner's premises. I would not go so far as to say that such preliminaries could shield evidence later discovered if it were obtained without going on the premises of a suspect. Such a holding, it seems to me, would open the door unnecessarily to claims of immunity buttressed on routine and proper investigatory actions of police. Even if the request to enter in this case was improper, it by no means follows that that conduct alone was so shocking as to taint evidence virtually handed to the officers on a silver platter or, in this case, on an iron grating.

SUPREME COURT, U. S.

FILED

AUG 24 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1966.

No. [redacted] 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

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Table of Contents.

Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Argument	6
I. The actions of the police were proper at each moment of their encounter with the respondent, and the officers' supposed intentions are irrelevant	6
No Court of Appeals in any other circuit has adopted a subjective standard to determine probable cause for arrest	10
II. The record does not support the holding of the Court of Appeals	12
III. There was no violation of the respondent's constitutional rights under the Fourteenth Amendment of the Constitution of the United States	13
A. The respondent consented to the entry of the police into the apartment	14
B. Under the reasonable standards adopted by the courts of Massachusetts, the police had probable cause to arrest respondent	18
C. The articles found during the subsequent search were lawfully seized	22
The scope of the search was reasonable	23
IV. The respondent is without standing to suppress the introduction into evidence of the guns which he abandoned	24

V. The officer's use of the apartment as a passageway so as to retrieve the guns from the fire-escape is, at best, a mere trespass, and does not entitle the respondent to suppress the guns 25

Conclusion 26

Table of Authorities Cited.

Cases.

Abel v. United States, 362 U.S. 217 (1960) 25

Agnello v. United States, 269 U.S. 20 (1925) 23

Beck v. Ohio, 379 U.S. 89 (1964) 19

Brinegar v. United States, 338 U.S. 160 (1949) 20

Chapman v. United States, 346 F. 2d 383 (9th Cir., 1965) 15, 16, 17

Commonwealth v. Ballou, 350 Mass. 751; cert. den. 385 U.S. 1031 8

Commonwealth v. Binkiewicz, 342 Mass. 740 3

Commonwealth v. Carey, 12 Cush. 246 7

Commonwealth v. Lawton, 348 Mass. 129 8

Commonwealth v. Lehan, 347 Mass. 197 7

Commonwealth v. Painten, 368 F. 2d 142 (1st Cir., 1966) 3

Commonwealth v. Phelps, 209 Mass. 396 7

Commonwealth v. Roy, 349 Mass. 224 7

Cutchlow v. United States, 301 F. 2d 295 (9th Cir., 1962) 10, 11

Davis v. California, 341 F. 2d 982 (9th Cir., 1965) 15

Draper v. United States, 358 U.S. 307 (1959) 23

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 23

Harris v. United States, 331 U.S. 145 (1947) 23, 24
Hester v. United States, 265 U.S. 57 (1924) 25, 26
Hobson v. United States, 226 F. 2d 890 (8th Cir., 1955) 21, 22
Johnson v. United States, 333 U.S. 10 (1948) 14, 15, 18
Jones v. United States, 362 U.S. 257 (1960) 24
Ker v. California, 374 U.S. 23 (1963) 7, 20, 21
Lee v. United States, 308 F. 2d 715 (4th Cir., 1962) 26
Mapp v. Ohio, 367 U.S. 643 (1961) 7
Painten v. Commonwealth, 252 F. Supp. 851 (D.C. Mass., 1966) 3
Robbins v. MacKenzie, 364 F. 2d 45 (1st Cir., 1966); cert. den. 385 U.S. 913 15, 16, 17
United States v. Cachoian, 364 F. 2d 291 (2d Cir., 1966) 15, 16, 17, 25
United States v. Lefkowitz, 285 U.S. 452 (1932) 23
United States v. Rabinowitz, 339 U.S. 56 (1950) 23, 24
Warden v. Hayden, 35 U.S. L. Week 4493 (May 29, 1967) 23
Weeks v. United States, 232 U.S. 383 (1914) 23

STATUTES, ETC.

U.S. Constitution, Fourth Amendment 2, 7, 8
U.S. Constitution, Fourteenth Amendment 2, 8, 13

28 U.S. Code, § 1254 (1) 2
28 U.S. Code, § 2241 (a) 3
28 U.S. Code, § 2254 3

Mass. G.L. c. 263, §§ 1-9 26

Supreme Court of the United States.

October Term, 1966.

No. 929.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 252 F. Supp. 851, and the opinion of the United States Court of Appeals for the First Circuit, dated November 10, 1966, is reported at 368 F. 2d 142.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The

petition for certiorari was filed on January 3, 1967, and certiorari was granted on February 20, 1967. The jurisdiction of this court is invoked under 28 U.S. Code, § 1254 (1).

Questions Presented.

1. Should the state of mind of police officers nullify an arrest and an incidental search and seizure, conducted in accordance with reasonable, workable and lawful procedures?

2. Were the respondent's constitutional rights violated by admission into evidence of both property abandoned before arrest and property seized during a post-arrest search?

Constitutional Provisions and Statutes Involved.

1. Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States, Amendment XIV:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The respondent, Painten, filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (R. 2-7). The petition was brought pursuant to 28 U.S. Code, § 2241 (a), and 28 U.S. Code, § 2254. Painten sought to set aside a conviction in the Middlesex Superior Court for armed robbery and related offenses. His conviction had been affirmed *sub nom. Commonwealth* v. *Binkiewicz,* 342 Mass. 740 (1961). The writ was granted, *Painten* v. *Commonwealth,* 252 F. Supp. 851 (D.C. Mass., 1966), and the Commonwealth appealed. The United States Court of Appeals for the First Circuit affirmed the decision. *Commonwealth* v. *Painten,* 368 F. 2d 142 (1st Cir., 1966). This court granted certiorari on February 20, 1967.

The facts material to the consideration of the questions presented are as follows:

On or about March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, observed the respondent and one George Ash in an automobile in the South End of Boston (R. 24). George Ash was known to the officers personally and Painten was identified from a "mug shot" in the pocket of Officer McNamara (R. 24-25). Both men were known to have records (R. 26, 33). There had been a rash of liquor-store holdups, and a loan-company holdup that day, which robberies were known to the police officers (R. 24, 26). The

officers decided to keep both the respondent and George Ash under surveillance (R. 24).

The two men stopped in front of a liquor store, whereupon respondent got out of the car, the motor of which was still running, and entered the store (R. 24). Ash, the driver of the car, upon seeing the officers "took off" down the street with a burst of speed. The officers, using the siren, gave chase. After several blocks the officers overtook the car (R. 25). Ash was ordered out of the car and asked why he had fled. His reply was that "McNamara had scared him" (R. 25). The officers looked in the car and, after some conversation, let Ash go on his way in the hope that Ash would lead them to Painten (R. 26).

The officers discovered that Painten had an apartment on Dartmouth Street, in Boston's South End (R. 26). They went to the apartment building and found the car that Ash, when pursued, had been driving (R. 26). A check of the front door of the apartment building disclosed respondent's name under one of the bells (R. 26). Upon this discovery, Officer McNamara put in a radio call for two more officers (R. 27).

When the other officers arrived, McNamara informed them that they were "going up to see some fellows in an apartment," and assigned them to watch the front and rear of the building (R. 27). Officers McNamara and Maxwell then proceeded upstairs and knocked on the respondent's door. Respondent answered the knock, by opening the door only a few inches. He asked: "Who's there?" McNamara showed his badge and replied: "It's the police. We'd like to talk to you." Respondent asked the police to wait a minute. McNamara replied that they would, and respondent closed his door. While the door was closed, McNamara heard inside the apartment a sound like that of a window being raised and lowered. The officers

patiently waited for a few seconds, until respondent reopened the door. McNamara and Maxwell were then admitted to the apartment by the respondent (R. 27).

Inside the apartment, the officers found George Ash and a woman (R. 27). Respondent stated that the apartment was his. There was some conversation between McNamara and the occupants of the apartment. No search either of respondent's person or of his apartment took place at this time (R. 27-28).

About three minutes after McNamara and Maxwell were admitted to the apartment, the officer stationed in the rear of the building came up to the apartment and said: "They threw a bag out the window" (R. 28). This bag had landed on the fire-escape directly under the corner window of respondent's kitchen, the window from which the bag was dropped. The officer went down the fire-escape from the third floor (R. 52) to the second-floor level and retrieved the brown paper bag (R. 28). In the kitchen of respondent's apartment, McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about the bag (R. 28). Respondent stated that he knew nothing about them. (Later, at the evidentiary hearing before the District Court on his petition for writ of habeas corpus, he admitted that the guns belonged to George Ash (R. 19).) McNamara thereupon placed the respondent under arrest. He then proceeded to search the apartment (R. 28).

During the search of the apartment, the officers seized a box of .32 caliber shells found in respondent's kitchen and money (about $980) found under the mattress in respondent's bedroom. The officers also seized a roll of waxed paper because its edge matched the edge of the waxed paper in which the guns had been wrapped (R. 28, 37-38).

During the weekend, F.B.I. agents made a list of the serial numbers of the money found in the apartment. The serial numbers of some of the bills matched those of bills that had been taken in the robbery of the People's National Bank in Marlboro, Massachusetts (R. 37).

The seized articles and the serial numbers of the bills were introduced at respondent's trial for robbery of the People's National Bank.

Argument.

I. The Actions of the Police were Proper at Each Moment of Their Encounter with the Respondent, and the Officers' Supposed Intentions are Irrelevant.

The Court of Appeals has said in the decision below that the police, "knowing of a crime" and knowing that the respondent and his companion were suspicious characters, set out to arrest and search the men "in the hope that evidence would develop" (R. 64). This view—that the police were initially, at least, on a fishing expedition—apparently led the court to arrive at what we submit is an untenable result, namely that the actions of the police, although reasonable and lawful at each moment of their encounter with the respondent, were somehow tainted because of the officers' initial reasons for investigating the respondent.

The Commonwealth respectfully submits that a review of the record will show that the officers' entry into the respondent's apartment was legal, was free from coercion, and was with the consent of the respondent; that thereafter circumstances constituting clear probable cause for the arrest of the respondent came to the officers' attention; and that the ensuing search and seizure were incidental to a valid arrest. The Commonwealth further submits that speculation as to why the officers went in the first place to

the apartment of the respondent is immaterial, so long as their conduct, measured by objective standards, was proper. No decision of this court has gone so far as to suggest that an otherwise lawful arrest, and search and seizure incidental thereto, are rendered unlawful on the basis of speculative testimony as to the private hopes or thoughts of the officers involved. The only requirement or standard set down is one of reasonableness. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In *Ker* v. *California*, 374 U.S. 23, 34 (1963), this court said: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." The courts of the Commonwealth of Massachusetts have been zealous in protecting the rights of defendants and have formulated reasonable and workable rules regarding arrests, searches and seizures which, we submit, do not violate the Fourth Amendment of the Constitution of the United States.

The law of the Commonwealth was stated as early as 1853, when the Supreme Judicial Court, in the case of *Commonwealth* v. *Carey*, 12 Cush. 246, 251, held that an arrest was not unlawful if the police officer suspected one on his own knowledge of *facts*, or facts communicated to him by others, and thereupon had *reasonable grounds* to believe that the accused had been guilty of a felony. In accord, see *Commonwealth* v. *Phelps*, 209 Mass. 396, 404; *Commonwealth* v. *Lehan*, 347 Mass. 197, 206; *Commonwealth* v. *Roy*, 349 Mass. 224, 230. This rule sets forth an objective standard for determining the validity of an arrest, and does not call for analyzing the mental process of each law-

enforcement official. The idea of a subjective standard has been rejected, and, we believe, properly so. ". . . the Commonwealth should not be conclusively bound or limited by the officer's choice of words made subjectively in the active execution of his duties." *Commonwealth* v. *Lawton,* 348 Mass. 129, 132.

More recently, the Commonwealth reiterated its position on the arresting officer's state of mind in the case of *Commonwealth* v. *Balloy,* 350 Mass. 751; cert. den. 385 U.S. 1031. At page 756 the court states:

> "The captain's testimony that he considered the defendant to be under arrest before coming within five feet of him and before a word was spoken or any physical restraint imposed was an opinion on a matter of law which does not estop the Commonwealth or foreclose the courts. *Commonwealth* v. *Lehan,* 347 Mass. 197, 205, 207. *Commonwealth* v. *Lawton,* 348 Mass. 129, 132-133. The trial judge in effect so ruled, and correctly."

There are compelling and obvious reasons for the adoption of an objective rather than a subjective standard in determining the existence or non-existence of probable cause for an arrest. How can one possibly ascertain the real motives of any person, including a police officer, for doing what he does? Moreover, it would seem obvious that, for Fourth and Fourteenth Amendment purposes, what a police officer does is more important than what he thinks. A police officer's state of mind cannot violate the constitutional rights of an accused; only his actions can violate the rights of an accused. If the courts are to attempt to decide a case based solely on the thinking of the police as opposed to overt acts, the result will place a premium on prevarica-

tion and on the giving of smooth and bland reasons by carefully coached police witnesses. Moreover, it will be impossible to ascertain in advance whether a particular search was or was not legal.

It is only reasonable to assume, of course, that the police in the instant case would not have gone to the apartment of the respondent if they did not suspect that he had some connection with a crime. This is probably true in most instances where a police officer goes to the home of a person with a reputation similar to that of the respondent. What counts is what the officer does when he arrives at the home of a suspect, and whether what he does violates any substantive rights of the respondent. The officer's testimony as to his own personal reasons for going to the respondent's house is irrelevant.

If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials. Under the decision of the Court of Appeals, the attitude of police officers would necessarily have to be: "Don't think, or your subsequent actions will be invalid." Even worse, police officers would feel compelled to give reasons other than the true ones.

Just as an individual cannot be arrested for what he thinks—just as he must first commit some overt act which constitutes a crime—so a police officer should not be precluded from making an arrest merely because he has private thoughts of his own. So to hold would severely hamper the prosecutions of crime throughout the country. With the increase in crime across the nation, law-enforcement officials need help, not hindrances, in protecting the interests of society. This court can give law-enforcement officials this help while, at the same time, this court can insist that, by every objective standard, proper regard be paid to the protection of the rights of the accused.

No Court of Appeals in Any Other Circuit has Adopted a Subjective Standard to Determine Probable Cause for Arrest.

After a diligent search we are unable to find in the other circuits any authority which supports the use of a subjective test for determining probable cause for the arrest of an accused. The idea was, moreover, explicitly rejected by the Ninth Circuit.

In the case of *Cutchlow* v. *United States,* 301 F. 2d 295 (9th Cir., 1962), three officers went to the home of the defendant, armed with a warrant for the arrest of one James Turner and a detention warrant for the defendant issued pursuant to an Oregon statute. As the officers approached the house, they observed the defendant and one David Jones walking toward the house. When the defendant and Jones noticed the officers, they hastened into the house. The officers immediately encircled the house, one in the rear, one at the side and one at the front door. The officers heard a loud banging noise (in the rear of the house) and a sound as though a rear window were being thrown open and a screen torn. An instant later, a jar landed almost at the feet of the officer in the rear. The officers then entered the front door, which was being opened by Jones. The officers, passing Jones, went into the living room, wherein they observed the defendant coming from the back of the house. The defendant was informed of the detention order and asked to sit down. At this time, federal narcotics agents arrived. A field test for heroin made on the substance found in the jar proved to be positive. The defendant was taken to police headquarters. The defendant claims that the approach of the officers so fright-

ened her that she "cast her constitutional rights out of the window." The court stated at page 297:

> "The officers had the lawful right and duty to approach appellant's residence in seeking Turner for whose arrest they had a valid warrant. There was no misconduct in the manner of their approach and considering the actions of appellant and her then unidentified companion Jones, the officers were justified in attempting to surround the house to prevent the possible alerting and escape of Turner. *Whatever intent or purpose may have been in their minds, no improper or unlawful act of any kind was committed by any of the officers prior to the jar containing heroin being thrown out of the window at the officer's feet.* In the circumstances there was no reason in fact or law why the jar should not have been recovered and its contents examined by the officers at the scene. The heroin exhibit was legally obtained and properly admitted into evidence." (Emphasis supplied.)

Cutchlow is similar to the case at bar. In *Cutchlow,* suspicion was aroused by the act of the defendant in hastening into the house after seeing the officers. In the case at bar, suspicion was aroused by the sudden flight of the respondent's companion, Ash, upon seeing the officers (R. 25). In both cases there was no misconduct on the part of the police in the manner in which they approached the defendant and the respondent. In both cases, neither was there forcible entry, nor was admission of police to the respective apartments gained by trickery. The same considerations which compelled the rejection of a subjective test in *Cutchlow* also compel a rejection of the subjective test in the instant case.

II. The Record does Not Support the Holding of the Court of Appeals.

The Court of Appeals seems to have concluded from the testimony of Officer McNamara that he had personal motives which tainted both the subsequent arrest and the search and seizure. The pertinent testimony is as follows:

> "Q: Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant?
>
> "A: Yes, sir.
>
> "Q: Can you state to the Court what that was?
>
> "A: Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes." (R. 32.)
>
> "Q: When he returned to the South End, as you might expect, for the company of Painten whom he had left just earlier, what gave you reason to feel that you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car?
>
> "A: When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is hiding there, these things in my mind lead me to arrest him for that holdup.
>
> "Q: That is the only basis, the reason for arresting him for the finance company holdup?
>
> "A: Because of their records and association and the officer coming in, and discovering the guns." (R. 34-35.)

We submit that the last answer of Officer McNamara clearly indicates that he had no intention to arrest the respondent until after the discovery of the guns. The guns were not discovered until the police had already been admitted into the apartment. Therefore, prior to the officers' admission into the apartment, there could have been no intent to arrest the respondent.

The strongest indication of the fact that Officer McNamara did not intend to arrest the respondent upon going into the apartment is the officers' conduct at the front door. The respondent went to the door, saw the officers, and asked them if they would wait a minute. *The officers agreed, and the respondent closed the door* (R. 27). Clearly, if the officers intended either to arrest the respondent or to make a forcible entry, they would not have permitted the respondent to close the door. They would certainly realize that, by allowing the respondent to close the door, they gave him opportunity either to escape or to dispose of evidence. Nevertheless, the officers waited patiently until the door was reopened by the respondent (R. 27).

III. There was No Violation of the Respondent's Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States.

The petitioner contends that the articles obtained by the officers in the apartment of the respondent were not obtained through an unreasonable search and seizure. In so contending, the petitioner relies on the fact that the police officers were voluntarily admitted by the respondent into the apartment; that at the time of the arrest, which occurred in the apartment, the police had probable cause to make the arrest; and that the articles found during the search of the apartment were lawfully seized.

A. The Respondent Consented to the Entry of the Police into the Apartment.

The facts as found by the District Court indicate that the respondent consented to the entry of the police into his apartment. "Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked 'Who's there?' McNamara showed his badge and replied, 'It's the Boston Police. We'd like to talk to you.' Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment" (R. 52).

We recognize, of course, that entry into the living quarters of a defendant *demanded under color of office* can involve a submission to authority rather than an understood and intentional waiver of a constitutional right. *Johnson* v. *United States*, 333 U.S. 10, 13 (1948). In *Johnson*, the police received information from a confidential informer that unknown persons were smoking opium in a certain hotel room. The officers went to the hotel, where they recognized a strong odor of burning opium coming from a room. The officers did not know who was occupying the room. The officers knocked at the door and stated that they wanted to "talk a little bit." The defendant opened the door and, according to the officers, "stepped back acquiescently and admitted us." One officer then said: "I want to talk to you about this opium smell in the room here." The defendant denied that there was such a smell. The officer then said: "I want you to consider yourself under arrest because we are going to search the room."

The search uncovered opium. This court ruled that "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion." 333 U.S. 10, 17.

However, in the case at bar, the respondent requested the officers to wait a moment. They complied with his request. They did not attempt to force an entry and they did not attempt to demand entry. The defendant was obviously not in fear. Instead, the officers patiently waited for him to reopen his door. Neither such a request to wait nor compliance with such a request are to be found in the *Johnson* case. It should be noted in *Johnson* that there was sufficient evidence to enable the officers to procure a search warrant. We submit that the most serious consequences to law enforcement would result if the *Johnson* case is not limited to those factual situations where there is either some evidence of, or suggestion of, coercion by the officer, or fear on the part of the defendant.

There appears to be no other post-*Johnson* decision of this court involving access by police officers to the premises of a defendant where consent for police officers to enter his premises was in issue. However, there have been cases decided by the Courts of Appeals which hold that, under circumstances similar to those in the case at bar, consent had been given: *Davis* v. *California,* 341 F. 2d 982 (9th Cir., 1965); *Chapman* v. *United States,* 346 F. 2d 383 (9th Cir., 1965); *Robbins* v. *MacKenzie,* 364 F. 2d 45 (1st Cir., 1966); cert. den. 385 U.S. 913; *United States* v. *Cachoian,* 364 F. 2d 291 (2d Cir., 1966).

In the case of *Davis* v. *California, supra,* the court found that the officers were voluntarily admitted to the motel room, where they had followed a woman, knocked on the door, displayed their badges, identified themselves as police officers,

told her that they were investigating narcotics activity, and stated that they wanted to talk to her.

In *Chapman, Robbins* and *Cachoian* the courts found that the officers were voluntarily admitted to the premises. From a factual point of view, these cases are very similar to the case at bar.

In *Chapman* the F.B.I. was investigating the theft of certain bank property. When the officers went to the home of the defendant, they knew only that she was a former employee of the bank in the section where the documents were missing and that she had refused to return her key to the office upon request of the office. The officers rang the doorbell, identified themselves, stated they were investigating the loss or theft of papers from the People's Bank and asked to enter and talk to her. The court found that the defendant gave her consent.

In *Robbins* the police knew that the defendant had been convicted of a crime similar to the one under investigation. They went to the rooming house where the defendant was staying and stationed one officer at the back door. The officer at the front door knocked. When the officer received a response, he identified himself and stated that he wished to talk with the defendant. The defendant opened the door and walked back into the room. The court found that here the unlocking and opening of the door was consent to talk with the officers, and that the walking back into the room was an implied invitation to conduct the talking inside the room.

In *Cachoian* two government agents went to the defendant's apartment while another agent went into the courtyard of the adjoining apartment house. The two agents heard voices inside the apartment and knocked. Nobody answered. To a second knock a voice responded. The agents identified themselves and stated that they wanted to talk

with the defendant. There was a silence; then the agents knocked again. The defendant opened the peephole and the agents displayed their badges. The defendant then requested the agents to wait until his wife got dressed. While they were waiting, the agents heard a flushing of a toilet and the opening and closing of a window. When the defendant returned to the door, he asked if the agents had a warrant; they said "No," that they merely wanted to talk to him. In requesting entrance, the agents used an "authoritative law enforcement" tone of voice. Meanwhile, the agent in the courtyard saw someone dressed in a white shirt and dark tie open the window and make a throwing gesture. The agent felt something hit him; the object proved to be a package of glassine envelopes containing heroin. The first two agents were admitted into the apartment. When the third agent entered the apartment, he saw he defendant dressed like the man who had both opened the window and made the throwing gesture. The court finding that there was consent for the agents to enter, stated at page 292:

> "Here, appellant probably believed that he was in the clear, having thrown the contraband out the window."

In *Chapman, Robbins* and *Cachoian* the police did not use any force, threat or coercion to gain entry. In the case at bar the police did not use any force, threat or coercion to gain entry. In all cases the police knocked on the door, identified themselves, stated their purpose. In all cases the police were admitted to the apartments. Admission under these circumstances indicates consent by the respondent for the police to enter the apartment. While this court is, of course, not bound by the Courts' of Appeals decisions analyzed above, we submit that this rationale is

both persuasive and, indeed, compelling, and should be adopted in the present case. If it is adopted, the conclusion is inescapable that the officers, in the case at bar, were legally on the premises.

As a practical matter, if no consent to enter the apartment is found under the circumstances of the case at bar, it is very unlikely that consent could *ever* be found in a case where a police officer goes to the home of a person, asks to be admitted, states his purpose, and, after being admitted, discovers evidence which gives rise to the arrest of the occupant. Such a holding would have a devastating effect on law enforcement for the reason that officers would be afraid ever to go to the home of a suspect to question him as a part of the investigative process, if there was any likelihood that evidence would come to the officers' attention while they were on the premises. It would be most undesirable to hold —without any evidence of threat or coercion—that law-enforcement officers are precluded from calling on persons, from identifying themselves, and from asking to be admitted for purposes of conversation with the resident. This is not to say that the court should not scrutinize very carefully the conduct of an officer. If under all the circumstances his admittance appears to be the result of coerced submission to authority—if he attempts to search the premises—the *Johnson* rule should apply. But, in facts like the present case, we submit that the entry must be held lawful.

B. Under the Reasonable Standards Adopted by the Courts of Massachusetts, the Police had Probable Cause to Arrest Respondent.

Shortly after the police entered the apartment of the respondent, the officer who had been stationed at the rear of the building came up to the apartment and stated that a bag had been thrown out of one of the windows (R. 28). The

bag was retrieved and opened. The bag contained two guns and bullets wrapped in wax paper (R. 28). The police then placed the respondent under arrest (R. 28).

In determining whether or not an arrest is valid, the court must look to see if probable cause existed at that moment. *Beck* v. *Ohio,* 379 U.S. 89 (1964). At the moment of the arrest of the respondent the following facts were known to the officers:

1. There had been a number of liquor-store holdups and other holdups in the general area of the officers' patrol. The officers observed that the respondent and his companion drove their car alongside of a liquor store on Columbus Avenue and that the respondent went inside the store while his companion remained inside the car which had its motor running (R. 24).

2. From a photograph in the pocket of Officer McNamara, the officers recognized the respondent. The respondent's companion, George Ash, was known to the officers. The officers knew that both men had criminal records (R. 25-26, 33).

3. While he awaited the return of the respondent to the car, George Ash recognized the police officers and took off in a burst of speed. The officers gave chase and finally caught Ash (R. 25).

4. The officers permitted Ash to leave in the hope of finding the respondent. When the officers arrived at the apartment of the respondent they heard what sounded like a window being raised and lowered (R. 26-27).

5. Before going into the apartment, Officer McNamara called for additional help (R. 27). When the additional officers arrived, one was stationed in the rear of the apartment building. This officer there observed something being thrown out of the window of the respondent's apartment (R. 28).

6. The officer who had been stationed in the rear of the building came upstairs, went through the third floor apartment (R. 52) to the fire escape on the second floor and there discovered a bag containing both guns and bullets (R. 28).

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). The Commonwealth contends that the above-stated facts would warrant the prudent man in *Brinegar* to believe that the respondent had committed the crime of robbery.

In the instant case, probable cause arose after the police were validly inside the apartment of the respondent. The same was true in *Ker* v. *California, supra,* with respect to the petitioner, Diane Ker.

> "Probable cause for the arrest of petitioner Diane Ker, while not present at the time the officers entered the apartment to arrest her husband, was nevertheless present at the time of her arrest. Upon their entry and announcement of their identity, the officers were met not only by George Ker, but also by Diane Ker, who was emerging from the kitchen. Officer Berman immediately walked to the doorway from which she emerged and, without entering, observed the brick-shaped package of marijuana in plain view. Even assuming that her presence in a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers' belief that she was in joint possession with her husband, that fact was accompanied by the officers' information that Ker had been using his apartment as

> a base of operations for his narcotics activities. Therefore, we cannot say that at the time of her arrest there were not sufficient grounds for a reasonable belief that Diane Ker, as well as her husband, was committing the offense of possession of marijuana in the presence of the officers." 374 U.S. 23, 36-37.

In the case at bar the respondent attempted to dispose of the guns and bullets in his apartment by tossing them out onto the fire-escape below. The discovery of the guns and bullets by the police after the officers were validly inside the apartment was a fact which, when coupled with other facts known to the officers, gave them reasonable cause to believe that the respondent had committed the crime of robbery. However, the Court of Appeals ruled that the act of the respondent in throwing the guns out of the window was involuntary and that he was forced to hurl the guns from his window because of the actions of the police. To support this holding the Court of Appeals cites the Eighth Circuit case of *Hobson* v. *United States,* 226 F. 2d 890 (8th Cir., 1955).

The Commonwealth submits that reliance on the *Hobson* case is misplaced. In *Hobson,* defendant's wife—but not the defendant himself—had been under surveillance for years. On March 22, 1955, she participated in an illegal sale of narcotics, during which sale she was observed by a narcotics agent. On April 20, this agent, along with two Kansas City police officers, went to the residence of the defendant for the purpose of arresting his wife for the March 22nd offense. The officers did not have either a warrant of arrest or a search warrant. The defendant and his wife lived with the wife's mother in a private home. Upon arrival at the house, one officer went to the back of the house for the purposes of apprehending anyone who might try to get out and of recovering any evidence that might

be thrown out from the house to the rear of the premises. The defendant's wife appeared at the door in her slip. The officers identified themselves and demanded admittance. About this time the officer in the rear shouted, "He threw some stuff out of the window." The officers at the front door then made a forced entry. The defendant had thrown a package into his own back yard. At the time of entry, the contents of the package were unknown. The court ruled that the backyard was part of the protected curtilage of the defendant's home, and the defendant violated no law merely by throwing a package out of the window into his own back yard. The court further ruled that the defendant's act of throwing the package was involuntary, forced by the actions of the officers.

In the case at bar, the police had reason to believe that the respondent had committed an offense even though at that time their suspicion fell short of probable cause. In *Hobson* there is no indication of suspicion focussing on the defendant. In the instant case there was no forcible entry as there was in *Hobson*. In the instant case, the police felt that the respondent might have committed an offense; they set out to talk with him. There was no guise of arresting a third party to gain entry; instead, the police were straightforward in requesting the respondent to admit them into the apartment.

C. The Articles Found During the Subsequent Search were Lawfully Seized.

After the respondent was arrested, the officers proceeded to search the apartment. This search revealed, in addition to the guns and bullets previously recovered, a box of bullets and a large sum of money found under a mattress in the bedroom. A roll of wax paper was also seized because its edge matched the edge of the paper in which the guns

had been wrapped (R. 28, 37-38). This search was incidental to a valid arrest; it was, therefore, lawful. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914). *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). *Harris* v. *United States,* 331 U.S. 145, 150-152 (1947). *Draper* v. *United States,* 358 U.S. 307, 310-311 (1959).

The guns, bullets and money seized during the search were either instrumentalities and means by which a crime could be committed, or fruits of the crime. These objects were therefore properly seized. *Agnello* v. *United States, supra.* The only other item seized during this limited search of the respondent's apartment was a roll of wax paper. This seizure, too, was lawful for the reason that mere evidence can also be seized. *Warden* v. *Hayden,* 35 U.S. L. Week 4493 (May 29, 1967).

The scope of the search was reasonable.

The scope of the search, the Commonwealth contends, was reasonable. Articles were discovered in the bedroom and in the kitchen of the respondent's apartment. The facts do not indicate in which room the arrest was made. However, the Commonwealth submits that the arrest was lawful, and that, even in the absence of a search warrant, there is a permissible area of search beyond the person. *Harris* v. *United States, supra. Agnello* v. *United States, supra. United States* v. *Rabinowitz,* 339 U.S. 56, 61 (1950).

The Commonwealth does not contend that a general exploratory search is reasonable. *United States* v. *Lefkowitz,* 285 U.S. 452 (1932). However, there is no precise formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances. *Go-Bart Importing Co.* v. *United States;* 282 U.S. 344, 357 (1931). In the case at bar, the respondent was arrested on suspicion of the crime of robbery. The search was, therefore, spe-

cifically directed both to the instrumentalities by which the crime could be committed and to the fruits of the crime.

Another factor to be considered is the control of the premises. This court has held that, where an arrest was made on premises under the control of the person arrested, a search of those premises was lawful. *United States* v. *Rabinowitz, supra,* 339 U.S. 56, 61 (1950). The fact that the apartment was in possession of the respondent is undisputed. His control extended not only to the room in which he was arrested, but also to the entire apartment.

The articles searched for, *i.e.*, instrumentalities and fruits of the crime, could possibly have been concealed in any room of the respondent's apartment. The search was neither a situation where the articles, by virtue of their size, could have been more readily detected, and where, consequently, the search should have been less extensive, *Harris* v. *United States, supra,* 331 U.S. 145, 149, 152, nor a situation where the police conducted a search of general, indiscriminate exploration; this search, on the contrary, was narrow, reasonable, and conducted for a specific, limited end.

In light of both the nature of the articles searched for and the control of the premises by the respondent, the Commonwealth contends that the search of the entire apartment was reasonable.

IV. The Respondent is Without Standing to Suppress the Introduction into Evidence of the Guns which he Abandoned.

While the policemen waited at the front door for the respondent to admit them, a police officer stationed at the back of the building saw a bag thrown out of respondent's third floor (R. 52) apartment (R. 28). This bag, which landed on the fire-escape below, proved, upon examination, to contain two guns (R. 28). The respondent claims that he has standing to suppress such evidence. *Jones* v.

United States, 362 U.S. 257, 261 (1960), sets forth the prerequisites for standing. A person aggrieved by an unlawful search and seizure must show (1) that he is the victim of a search or seizure and (2) that he has a sufficient interest in the property seized. The respondent in the present case fails to show standing. The throwing of a bag out of the window is an act of volnntary relinquishment of one's property. His act was designed to conceal from the police his possession of the guns. *United States* v. *Cachoian, supra.* This court has held that the discarding of evidence by the defendant constitutes abandonment. In *Abel* v. *United States,* 362 U.S. 217, 240-241 (1960), the petitioner sought to suppress two items found by an F.B.I. agent after the petitioner had vacated his hotel room. The court said that the F.B.I. agent's seizure of such items was lawful because petitioner had abandoned those items. "He had thrown them away. So far as he was concerned, they were *bona vacantia.* There can be nothing unlawful in the Government's appropriation of such abandoned property. See *Hester* v. *United States,* 265 U.S. 57, 58."

In *Hester* v. *United States, supra,* the plaintiff in error claimed that the seizure of a jug of illicitly distilled whiskey which he dropped while he was fleeing police was inadmissible. The court said: ". . . there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." 265 U.S. 57, 58.

V. The Officer's Use of the Apartment as a Passageway so as to Retrieve the Guns from the Fire-Escape is, at Best, a Mere Trespass, and does Not Entitle the Respondent to Suppress the Guns.

While Officers McNamara and Maxwell were in the respondent's apartment, the officer assigned to the rear door

entered the apartment and informed them that a bag was thrown from the respondent's window onto the fire-escape below. The officer then went through the apartment to the fire-escape and retrieved the bag (R. 28). The concurring opinion of the Court of Appeals finds this conduct unlawful and holds that the officer improperly used the respondent's apartment as a "conduit of convenience" for seizing the bag on the fire-escape. Such conduct, however, is at most a mere trespass, which cannot be held to invalidate an otherwise proper seizure. *Hester* v. *United States, supra:*

> "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure." 265 U.S. 57, 58.

See also *Lee* v. *United States,* 308 F. 2d 715, 717-718 (4th Cir., 1962), which presents a situation similar to the case at bar.

Conclusion.

Many law enforcement officials feel that recent decisions of this court have hampered the effective enforcement of the laws of the several states and the country. However, the Commonwealth of Massachusetts has not adopted this attitude. Indeed, many of the rules safeguarding the rights of an accused enunciated by this court in recent decisions have been a part of our law for many years. These safeguards are evident in a section of our General Laws termed "Rights of Persons Accused of Crime" (G.L. c. 263, §§ 1-9). Because we have always zealously guarded the rights of those persons accused of crime, the Commonwealth of Massachusetts has rarely sought certiorari in any case involving constitutional rights. However, the decision of the Court of Appeals is completely opposite to the workable

rules established by the Commonwealth regarding searches and seizures; it shifts the test of illegal searches and seizures from one of overt acts to one of thoughts of the police. It suggests that a police officer, simply because he is such, cannot make a lawful entry into a residence with the consent of the occupant. It suggests that, once entry is lawfully gained onto the premises, probable cause cannot be established when evidence of a crime is discovered without a search. It suggests that police officers should be more like mechanical men rather than human beings with freedom of thought. Such a decision would destroy both existing morale and incentive for conscientious law enforcement. For these reasons the petitioner respectfully requests that this court affirm—

(1) That the states are still free to establish workable rules in investigations and in law enforcement;

(2) That the Commonwealth of Massachusetts has established workable rules which are reasonable safeguards both for the accused and for the police;

(3) That the subjective standard applied by the Court of Appeals is not and should not be the test adopted by the Commonwealth.

Therefore the Commonwealth respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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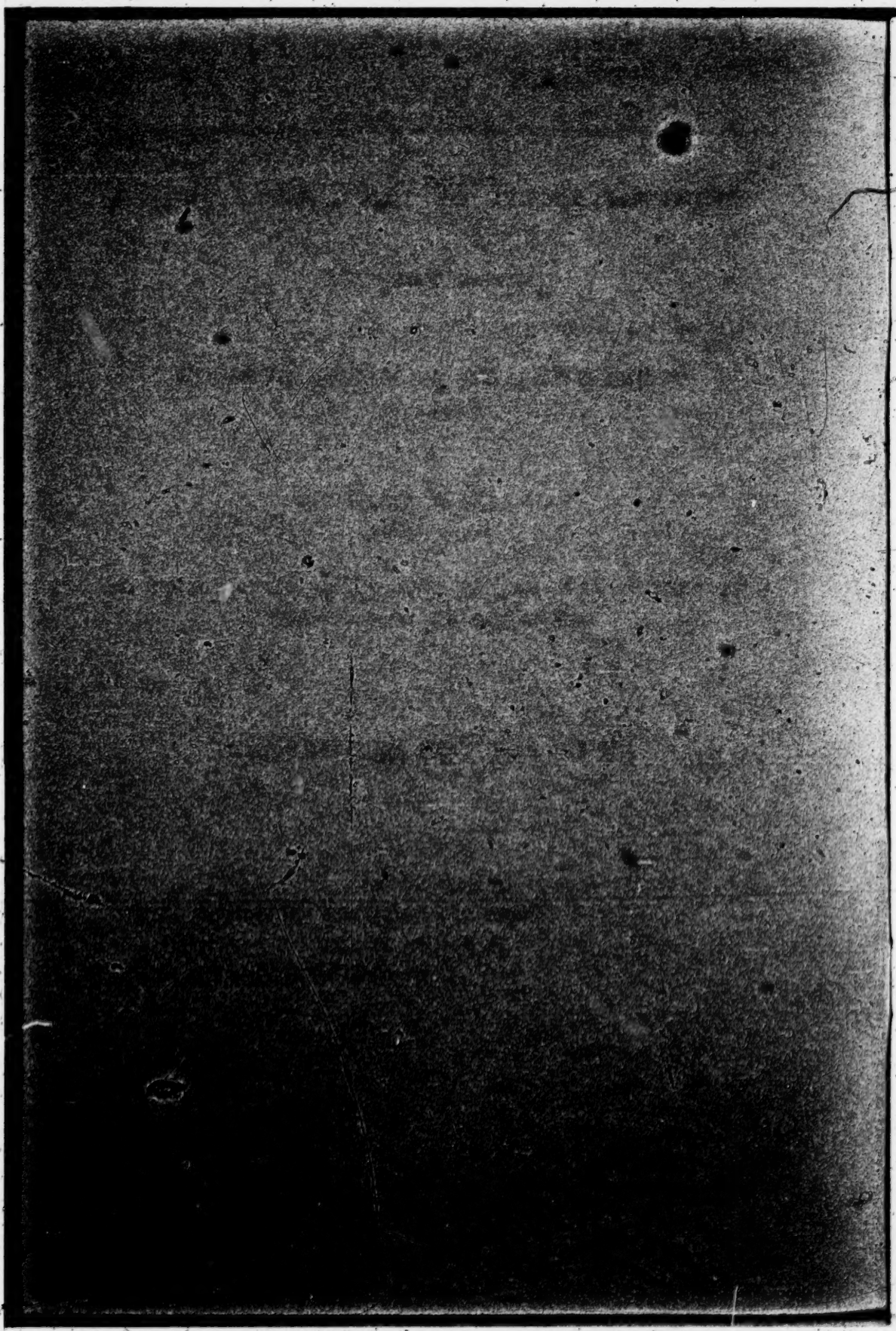

Table of Contents.

Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Questions presented	2
Statement of facts	4
A. Introductory summary	4
B. Source of alleged suspicion: association with a hoodlum, a liquor store, a police photograph and black soft hats	4
C. The decision to make the arrest, and positioning of officers to rear of building	5
D. The entry: "I said 'police officers' . . . I had my badge in my hand." The search: "I put my hand in [Ash's] pocket . . . Rufo . . . brought the bag back in the window"	7
Argument	9
I. The totality of circumstances apparent from the record shows the warrantless and groundless entry and search by the police were contrary to the provisions of the Fourth Amendment	9
II. The entry of the police, without a warrant and without probable cause, was not made valid by their recovery of the bag containing weapons dropped from respondent's window to the fire-escape	17
Conclusion	18

Table of Authorities Cited.

CASES.

Abel v. United States, 362 U.S. 217 (1960) 17

Chapman v. United States, 346 F. 2d 383 (9th Cir. 1965) 14

Cutchlow v. United States, 301 F. 2d 295 (9th Cir. 1962) 16

Davis v. People of the State of California, 341 F. 2d 982 (9th Cir. 1965) 13

Henry v. United States, 361 U.S. 98 (1959) 18

Hobson v. United States, 226 F. 2d 890 (8th Cir. 1955) 17

Johnson v. United States, 333 U.S. 10 (1948) 12, 13, 18

Judd v. United States, 190 F. 2d 649 (D.C. Cir. 1951) 13

Mapp v. Ohio, 367 U.S. 643 (1961) 12

Massachusetts v. Painten, 368 F. 2d 142 (1st Cir. 1966) 1, 9

Painten v. Commonwealth, 252 F. Supp. 851 (D.C. Mass. 1966) 1, 9

Robbins v. MacKenzie, 364 F. 2d 45 (1st Cir. 1966); cert. den. 385 U.S. 913 14

United States v. Blank, 251 F. Supp. 166 (N.D. Ohio, 1966) 18

United States v. Como, 340 F. 2d 891 (3d Cir. 1965) 13

United States v. Evans, 194 F. Supp. 90 (D.C. D.C. 1961) 13

Wong Sun v. United States, 371 U.S. 471 (1963) 18

Work v. United States, 243 F. 2d 660 (D.C. Cir. 1957) 18

STATUTES, ETC.

U.S. Constitution, Fourth Amendment 2, 3, 9, 20
U.S. Constitution, Fourteenth Amendment 2, 3

28 U.S. Code, § 1254(1) 2

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 252 F. Supp. 851, and the opinion of the United States Court of Appeals for the First Circuit, dated November 10, 1966, is reported at 368 F. 2d 142.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The petition for certiorari was filed on January 3, 1967, and certiorari was granted on February 20, 1967. The

jurisdiction of this court is invoked under 28 U.S. Code, § 1254(1).

Constitutional Provisions and Statutes Involved.

1. Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States, Amendment XIV:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented.

1. Whether the evidence in the record is sufficient to support the finding that respondent was denied his constitutional right to be free of unreasonable searches and seizures where Boston police officers, having by chance en-

countered respondent in company with a known hoodlum companion and having a photograph of respondent but without information regarding his arrest or offense record, and with no reason to connect him with any of the crimes being investigated, set out to arrest and search the men in the hope evidence would develop.

2. Whether the District Court is correct in finding, and the Court of Appeals correct in relying upon the finding, that Boston police officers were without probable cause to arrest respondent when they went to his apartment to ask him questions and arrest him on suspicion of a loan-company holdup, and thereby deprived him of his constitutional rights by seizing material to be used against him at a subsequent trial.

3. Whether the District Court and Court of Appeals are correct in finding that, since Boston police officers had no probable cause to arrest respondent and did not obtain his consent to a search when they entered his apartment, they cannot validate their unlawful entry by reliance upon the discovery of a bag containing guns and ammunition which respondent had thrown from his window onto a fire-escape when faced with the officers' entry.

4. Whether the District Court and the Court of Appeals are correct in finding the manner in which the Boston police entered respondent's apartment, without any expression of purpose and absent consent by the respondent, and their seizure of incriminating material from the fire-escape and from the apartment, the material thereafter used against respondent at his trial, constituted a denial of respondent's rights under the Fourth and Fourteenth Amendments, requiring the state court judgment of conviction to be vacated.

Statement of Facts.

A. Introductory Summary.

Respondent was brought to trial before a jury in 1958 on the charge of armed robbery and related offenses, and convicted. At his trial in the state court, guns, ammunition, and serial numbers obtained from dollar bills were among the most incriminating evidence. These had been seized by Boston police officers who had entered respondent's apartment one evening, without a warrant, and engaged in a search. The extent of cause for the entry and search, which is the subject of this statement and this case, may be summarized by petitioner's principal witness, a police officer, whose testimony was quoted in the opinion of the Court of Appeals: ". . . In that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 63).

B. Source of Alleged Suspicion: Association with a Hoodlum, a Liquor Store, a Police Photograph and Black Soft Hats.

On or about March 1, 1958, in the evening, two plainclothes officers of the Boston Police Department, McNamara and Maxwell, were travelling in an unmarked police car through the South End, one of the more depressed areas of the city. Directly in front of the officers at one point was a sedan with respondent and one Ash in the front seat. The officers stopped behind this car at a traffic signal. The first car, containing respondent and Ash, resumed its movement and came to a stop beside a liquor store. Respondent left the car and entered the store. Officer McNamara observed a similarity between respondent

and a police photograph the officer happened to have on his person. The officer had routinely taken the photograph from a desk at headquarters, adding it to others carried in his pockets (R. 24, 25).

At the time McNamara did not have respondent under suspicion for any crime (R. 30, 31). The officer knew nothing of respondent's police record, but assumed from the existence of the police photograph that respondent had been involved with the law (R. 33). Ash, the driver of the vehicle from which respondent had emerged, was known to the officer for robbery and for having been in prison (R. 26). Because of a number of liquor-store robberies, these officers watched the automobile as respondent emerged and as it moved away from its position in front of the store (R. 26, 25). Neither Ash nor respondent was then sought by police, nor were they the objects of specific suspicion (R. 30). When asked what aroused his suspicion when he observed respondent and Ash in the car McNamara had replied: "Well, our routine function is to be on the lookout for a rash of liquor store holdups at the time, and other holdups at the time. Both men seated in the car were wearing black soft hats. To me it did not look right. As a result, I figured I would give them a little surveillance" (R. 24).

C. The Decision to Make the Arrest, and Positioning of Officers to Rear of Building.

Ash recognized the police officers and fled in his automobile. The officers gave chase and apprehended Ash. The officer told him to get out of the car. "He did. I asked him, we could talk to each other, if we met in the street, what did he take off for? He stated, 'You scared me' " (R. 25). After a brief period of questioning and an

examination of his car he was released. The police followed him back to the neighborhood of the liquor store (R. 25, 26). The officer inquired of the liquor-store clerk, who replied that respondent had purchased some liquor, and lived a few doorways distant. McNamara testified that, when he first saw them, and saw Painten going in the liquor store, "I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is living there, these things in my mind lead me to arrest him for that holdup" (R. 35). Officer McNamara then went to the building designated as the location of respondent's apartment. Respondent's name was on the mailbox at the door (R. 31).

McNamara called for another team of police, and on their arrival told one of them: "We are going up to see some fellows in an apartment, if we can find them, will you watch the back of the building?" (R. 27). The District Court in its opinion observed: ". . . The calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview" (R. 55).

McNamara and his fellow officers entered the building and went up to respondent's apartment. "All that he knew when he knocked on Painten's door was that Painten had some sort of record and that he had seen Painten in a car with Ash who he knew had a record for holdups" (R. 55). When asked what gave him reason to decide to enter the Painten apartment without a warrant the officer had replied: "Well, in that household, it has people with a background, people that I knew were in there, I might

be able to solve a string of serious crimes" (R. 32). At this point in the court testimony the officer had admitted that he had no information from anyone connecting respondent with any holdups (R. 33). He had admitted that he did not know respondent's police record (R. 33). Asked "So at no time did you ever have a case involving Mr. Painten for robbery or armed robbery?" McNamara's reply was: "I don't believe I ever had him for another crime" (R. 33).

D. THE ENTRY: "I SAID 'POLICE OFFICERS' . . . I HAD MY BADGE IN MY HAND." THE SEARCH: "I PUT MY HAND IN [ASH'S] POCKET . . . RUFO . . . BROUGHT THE BAG BACK IN THE WINDOW."

McNamara and his fellow officer had made no effort to seek a warrant to enter the house (R. 32). At respondent's door they knocked and identified themselves as police officers. Painten opened the door a few inches and looked at the officers. He asked the officers to wait, and closed the door. The police then heard a window of the apartment open and close. The door was then opened. The officer testified: "we were allowed to enter" (R. 27). Respondent testified: ". . . . as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them" (R. 16).

Upon entering the apartment McNamara noticed the presence of Ash, who had earlier been questioned on the street, and respondent. There was a woman present. The officer noticed a bulge in Ash's pocket and immediately put his hand in the pocket, withdrawing a handful of money (R. 27). When the officer then went to the window to tell the others in back of the building to come up, one of them shouted that an object had been thrown from the

window (R. 28). One of these officers came from the back yard and entered the front of the building and then passed through the apartment. He climbed through a window above the fire-escape and retrieved a brown paper bag. In the apartment the bag was opened and found to contain two pistols and ammunition (R. 28).

McNamara then told respondent and the others that they were under arrest for "suspicion of a holdup on a loan company" (R. 28). The officer then searched the apartment, finding money and a box of bullets.

During the District Court hearing the officer at one point testified that his decision to arrest Painten had resulted from his observation of Ash and Painten together and his knowledge that there had been a recent holdup of a loan company (R. 35). A moment later he then stated that the discovery of the guns on the fire-escape had given him reason to make the arrest (R. 35). Having heard all the testimony of petitioner's police officers, and testimony of respondent, and having examined the stenographic transcript and entire record from the state court trial, the District Court found: ". . . The officers went to the apartment intending to ask Painten a few questions and then to arrest him 'on suspicion of the loan company job' " (R. 55).

The Court of Appeals found: "It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful" (R. 64).

At respondent's trial the material seized on the fire-escape and in his apartment was introduced into evidence, contributing measurably to his conviction.

Respondent sought a writ of error in the state court raising these matters and others, and the writ was denied. He then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. The writ was granted. *Painten v. Commonwealth*, 252 F. Supp. 851 (D.C. Mass. 1966). The state appealed. The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court. *Massachusetts* v. *Painten*, 368 F. 2d 142 (1st Cir. 1966). This court granted certiorari on February 20, 1967.

Argument.

I.

The Totality of Circumstances Apparent from the Record Shows the Warrantless and Groundless Entry and Search by the Police were Contrary to the Provisions of the Fourth Amendment.

1. Lacking a warrant, the police were without probable cause to make the entry, search and arrest.

> "Officer McNamara did not have probable cause to arrest Painten when he went to Painten's apartment and sought entrance thereto . . . the entrance into Painten's apartment without a warrant and absent any probable cause to arrest any occupant thereof was 'under color of their police authority' and there was 'no valid basis in law for the intrusion.'
>
> "It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth

Amendment makes unlawful." Opinion of Court of Appeals. (R. 64.)

The record amply supports the findings of the District Court and the Court of Appeals. The government's own police officer, testifying at the District Court, clearly establishes the factual situation at the time (R. 32, 33). Police officer McNamara made the decision to enter Painten's apartment and make the arrest (R. 35). It is evident from this officer's own testimony in the District Court that he had no substantial basis for suspecting the respondent as being involved in any crime then under investigation. What trace of suspicion did exist consisted of matters that at best could arouse interest on the part of the police, but only to the extent that such matters could later be part of a total picture of substance. Here the officer's suspicions were short of the substantial.

"I observed Mr. Painten in the vicinity of a cafe on Columbus Avenue, standing outside, inside of the bar many times and in the vicinity of the South End, and in company with other people whom I did know." (R. 33.)

"He had a record . . . What it was, I don't know. I don't recall, but I know he had one because I had a photograph in my pocket, taken at police headquarters." (R. 33.)

"I knew of the description of the men in the holdup, as a result of information received on our daily manifold. As I recall, they fitted the description, two white men, one tall, one a little shorter." (R. 30.)

"Ash's actions . . . XQ. . . . you mean fleeing the scene where you approached his vehicle? A. That is correct." (R. 32.)

This was noted by the District Court.

> "McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were 'two white men, one tall, one a little shorter.' As officer McNamara candidly admitted, there were 'plenty of other fellows around the South End that could possibly have gone into the same category' as Painten and Ash if they had come across his path." (R. 52.)

Prior to the entry into respondent's apartment nothing was added to the grounds for suspicion. There is little doubt that the primary reason for the entry was purely exploratory. As the state's own witness expressed it: "Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 32). When asked what information he had received that respondent had been involved in any holdups before that time, McNamara had replied: "I had no information from anyone" (R. 33).

With no more than what has been reviewed above, the officer decided to enter and make the arrest (R. 35). The

purpose was made clear by testimony from the principal officer. Without grounds to make an arrest on the street, the officers hoped the entry would reveal the necessary evidence (R. 64).

> "Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime." Opinion of Court of Appeals (R. 62).

This entry by the police under color of their authority was unlawful. This was a warrantless and groundless intrusion upon respondent's right of privacy and upon his right to protection from such police behavior. *Johnson* v. *United States,* 333 U.S. 10 (1948). *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Where there was no justification for the entry the search conducted thereafter was not constitutionally acceptable. *Johnson* v. *United States* (*supra*).

2. Respondent did not consent to a search.

The police, upon arriving at the door of respondent's apartment, did not at any time state their purpose. There was no request to talk. This is found by the Court of Appeals, and the officer's testimony supports this finding.

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' " (R. 27.) (R. 62.)

The record of testimony in the District Court shows that there was no remark addressed to the purpose of the of-

ficers' visit (R. 27). Although the question of consent to an entry is a preliminary question of fact at the trial level, it has been held that such consent is not to be lightly inferred. *United States v. Como,* 340 F. 2d 891 (3d Cir. 1965). Even if there had been an invitation to "come in," that would not be enough to waive the constitutional right against search. Some consent to the search itself must be given. *Judd* v. *United States,* 190 F. 2d 649 (D.C. Cir. 1951). *United States* v. *Evans,* 194 F. Supp. 90 (D.C. D.C. 1961). In *Judd* and *Evans* the defendant merely allowed the officers to enter. The search which followed was found illegal. In *Davis* v. *People of the State of California,* 341 F. 2d 982 (9th Cir. 1965), the defendant stated: "If you want to, come in and look around." The search was found legal because there was consent. The respondent in the case at bar testified at the hearing in the District Court that he did not consent to the entry by the officers.

> ". . . I opened the door and as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them." (R. 15-16.)

Having no knowledge of the purpose of the police, the respondent did open the door. At no time did the police request permission to conduct a search (R. 33). Although there had been no cause to enter and no consent to the entry or search, the officer immediately proceeded to explore the trouser pocket of respondent's companion, Ash (R. 27). No reason developed to support an arrest at this time. The search continued when an officer passed through respondent's apartment and went through the window to take the bag dropped earlier onto the fire-escape. The search was pursued without respondent's consent and was unlawful. *Johnson* v. *United States,* 333 U.S. 10 (1948).

The search by the officers was not within that category of validity encompassed by *Chapman* v. *United States,* 346 F. 2d 383 (9th Cir. 1965), or by *Robbins* v. *MacKenzie,* 364 F. 2d 45 (1st Cir. 1966). These cases cited resulted from situations where the officers were admitted without consent being given to search. However, within plain view there were articles of stolen property recognized by the officers without need to remove coverings, wrappings, containers or any obstruction to visual identification. These cases are clearly distinguishable from respondent's situation. Nothing incriminating was within plain view of the police. The conduct of the police as revealed in the record shows the purpose of the entry was to search.

3. The finding of the federal courts below that the police entered without probable cause and to make an arrest and search is amply supported by the record without reliance solely on testimony regarding the officer's intentions.

Petitioner has emphasized that the Court of Appeals found the entry, search and arrest by the police unlawful, relying on "the private hopes or thoughts of the officers involved" (Br. 7). An examination of the record does not support either this conclusion or the type of case to which the petitioner's brief on this subject is directed. Massachusetts decisions cited concern those cases where the officers had reason to connect the suspect with a crime (Br. 7). It is difficult to see the materiality of petitioner's observations, such as: "What a police officer does is more important than what he thinks" and "If the courts are to attempt to decide a case based solely on the thinking of the police . . ." (R. 8). The District Court and the Court of Appeals had testimony and a record that supported the findings without those courts ignoring the ac-

tions of the police and without their deciding solely on the basis of the thinking of the police. The principal officer testifying for the petitioner stated that he had no knowledge of the respondent's record of offenses beyond the assumption of some history which would have caused the police department to have the photograph (R. 33). He testified that he had not received any information that respondent had been involved in holdups (R. 33). The District Court observed: "I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview" (R. 55). It is unlikely that the grounds for arrest, or for an entry and search without a warrant, can be the subject of inquiry unless the police testimony regarding their sources of suspicion is given due regard. There is no reason to minimize testimony from a principal officer that he had no information connecting a suspect with a crime, or that the officer planned the entry, search and arrest for exploratory purposes. In the present case the manner in which the entry, search and seizure of property were executed, as described by the officer and by respondent, speak for themselves. These are not matters which were found only in the "private hopes or thoughts of the officers . . ." These circumstances were described in competent testimony of eyewitnesses, and no basis exists to say that the two courts below were in error to consider such testimony.

The opinions of the courts below show that officer McNamara's testimony was but part of the picture of events. There is no reason to consider all or part of this testimony irrelevant if it bears on the issue before the courts.

4. The findings and rulings of the courts below are within the established area of proving the reasonableness

and constitutional validity of entries, searches and arrests, and no novel departure appears in their opinions.

There is no mandate of disastrous proportions in the decision of the Court of Appeals. Petitioner puts forward this warning: "If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials" (Br. 9). The Court of Appeals had before it the transcript of proceedings in the District Court. Throughout the testimony there are questions and answers bearing directly upon the grounds for the decision to arrest, and for the entry and search. The actions of the officers and the reasons for these actions, as expressed candidly by the principal officer involved, amply support the findings and conclusions of the courts. There is no unusual dependence upon the mental processes of that officer. There is no departure from the ordinary manner of weighing eye-witness testimony and drawing reasonable conclusions therefrom.

Petitioner argues the difficulty presented by the courts below in the light of *Cutchlow* v. *United States,* 301 F. 2d 295 (9th Cir. 1962) (Br. 10-11). The police were justified in *Cutchlow,* having a warrant for the arrest of one person on the premises and a detention warrant for the defendant. To prevent the escape of those persons the police had good reason to surround the house. There was no unlawful entry, since the warrants were for people believed to be on the premises. In respondent's case we do not have the *Cutchlow* situation. The purpose of the police in the latter is clear. The court there was not confronted with the question of why the police went to the house. In respondent's case the purpose of the police was not explained by warrants. Competent testimony on the subject was properly considered.

II.

The Entry of the Police, Without a Warrant and Without Probable Cause, was Not Made Valid by their Recovery of the Bag Containing Weapons Dropped from Respondent's Window to the Fire-Escape.

1. The dropping of the bag from respondent's window to the fire-escape below was the result of the unlawful intrusion by the police, and not voluntary.

The police approached respondent's apartment door to enter, search and make arrests. Their entry was unlawful. It was as a result of their presence at the door that respondent dropped the bag of weapons and ammunition from his apartment window to the fire-escape. This was not a voluntary act, nor was it an abandonment of the property. *Hobson* v. *United States,* 226 F. 2d 890 (8th Cir. 1955). There are no features concerning *Hobson* that render it inapplicable to the case at bar. Petitioner's contention that the forcible entry in *Hobson* distinguishes that case from this on the question of voluntariness is without validity, since the forcible entry of *Hobson* came after the throwing, and the entry could not have caused the act.

The property taken in the bag from the fire-escape was not abandoned. This was not a case of the tenant discarding property. Here the court could not say: "He had thrown them away. So far as he was concerned, they were *bona vacantia.*" *Abel* v. *United States,* 362 U.S. 217, 240 (1960). There is no reasonable basis on which it may be assumed that respondent hurriedly dropped two guns onto the fire-escape outside and below his window with the intention of discarding them. The fire-escape was not so distant and not so inaccessible that respondent considered

the bag with the guns to be relinquished beyond his control. *Work* v. *United States,* 243 F. 2d 660 (D.C. Cir. 1957). *United States* v. *Blank,* 251 F. Supp. 166 (N.D. Ohio, 1966). The government had no right to appropriate the property on the ground that it had been abandoned by respondent.

2. The unlawful entry, search and arrest cannot be rehabilitated by the fruits of the search.

By climbing through respondent's apartment window onto a fire-escape and recovering therefrom a paper bag which on later examination in the apartment was discovered to contain guns and ammunition, the police did not make their initial intrusion lawful. The search was not made legal by what it turned up. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). *Johnson* v. *United States,* 333 U.S. 10 (1948). *Henry* v. *United States,* 361 U.S. 98 (1959).

Conclusion.

The record now before the court amply supports the finding of the District Court and the Court of Appeals that ". . . the police, knowing of a crime and knowing that [respondent and his companion, Ash,] were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop" (R. 64). Contrary to petitioner's view of the case, those courts did not rely solely upon what were the hopes and the thoughts of the police.

Testimony was taken in the District Court, and respondent and the petitioner's principal police officer were examined thoroughly by both sides. The testimony regarding

the officer's lack of information connecting respondent to any crime, the officer's assumption of a police record based on the existence of a police photograph, and the calling of additional officers to be posted about respondent's building, all pointed to the reason for their intrusion upon respondent's premises.

The purpose of the entry of respondent's apartment was revealed by testimony of the principal officer. Although the police had no information connecting either respondent or his companion Ash with any specific crime (R. 33, 34), they engaged in an entry after calling for additional police to surround the building. The officer testified that the entry was to make an arrest (R. 35). Yet the officer explained his purpose in making the entry and arrest when he stated: "Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 32). No warrant existed for any of the persons in the apartment. The testimony of the officer substantially supports the finding that there were no grounds to make an arrest and the entry was sought to search for such grounds. No evidence was introduced at the District Court hearing to make such a finding unreasonable or unwarranted.

The entry of the police, lacking probable cause and lacking a warrant, was unlawful, and the recovery of a package containing guns from a fire-escape did not make the entry valid. The package was taken from the fire-escape as part of the unlawful search. The bag of guns was not abandoned by respondent but was dropped to the fire-escape during respondent's initial alarm at the arrival of police at his door. The police had no right to seize these weapons.

The testimony at the hearing before the District Court, reviewed before the Court of Appeals, amply supports their decision to vacate the state-court judgment and order a new trial. The description of the police procedures in this case, as explained by the petitioner's own officer, gave reason for the Court of Appeals to observe: "It is precisely such tactics that the Fourth Amendment makes unlawful" (R. 64).

Respondent respectfully submits that the judgment below should be affirmed, and that such action will not introduce a departure from established principles in the law.

Respectfully submitted,

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On the brief:

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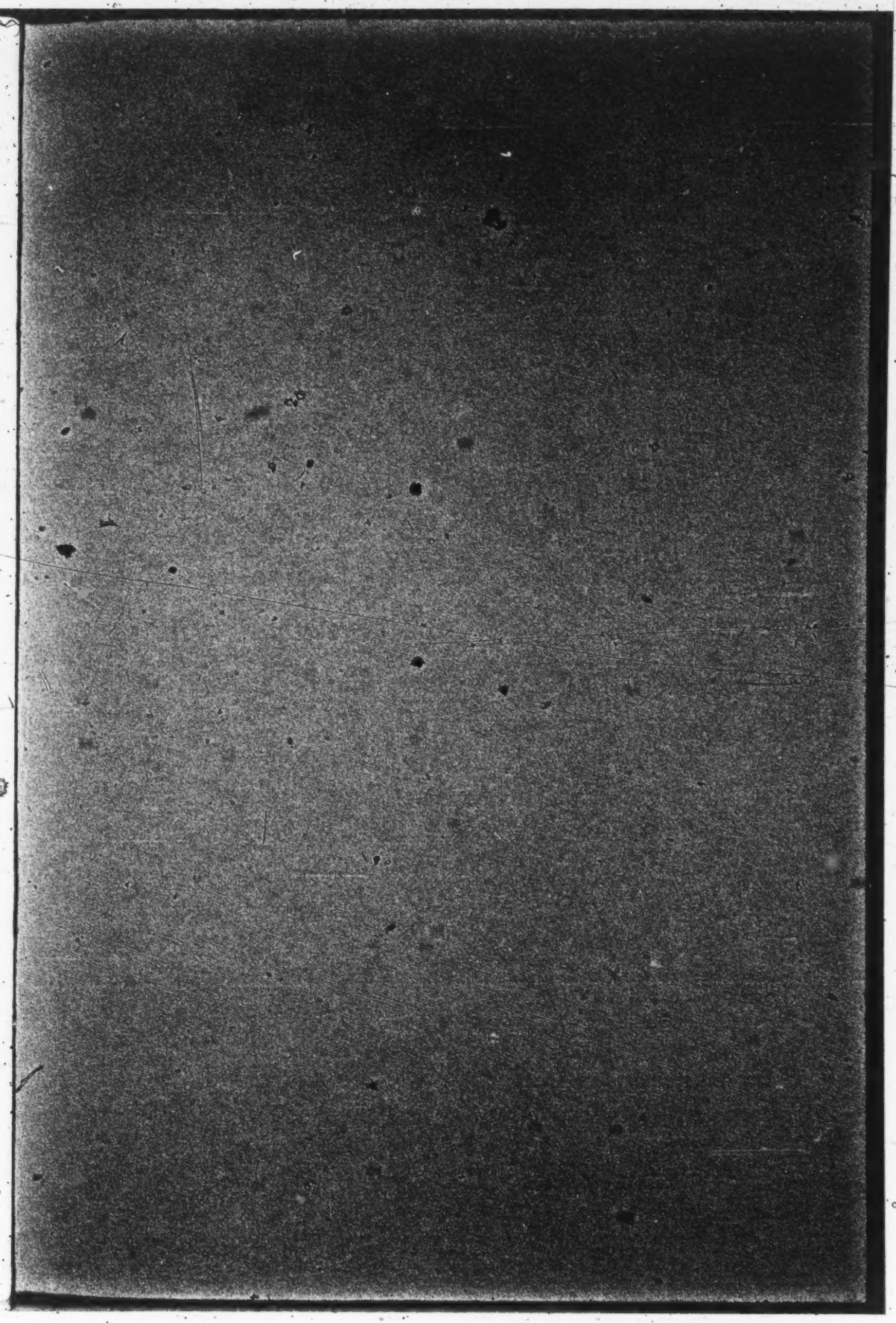

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 37

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

—v.—

DONALD M. PAINTEN,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS AS *AMICI CURIAE*

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INDEX

	PAGE
Interest of the *Amici*	1
Argument	2
Conclusion	16

Authority Cited

Fourth Amendment of the United States Constitution	*passim*

In the

Supreme Court of the United States

October Term, 1967

No. 37

Commonwealth of Massachusetts,

Petitioner,

—v.—

Donald M. Painten,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS AS *AMICI CURIAE*

Interest of the *Amici*

For a half century the American Civil Liberties Union has engaged in legal controversies in support of the Bill of Rights and of the continuing struggle for legal recognition of the demands of civilized procedure in the administration of criminal justice. We believe that the issue presented in this case is one of importance to the enforcement of the Fourth Amendment in a wide range of applications, going beyond the interests of the parties herein, and we wish with deference to submit our views concerning its proper resolution to the Court. The parties have consented to the filing of a brief by the American Civil Liberties Union. Copies of their letters of consent have been filed with the Clerk.

Argument

The question decided by the courts below and presented for review by this Court* is a subspecies of a broader issue that pervades administration of the Fourth Amendment. The issue is: what pertinency has a law enforcement officer's purpose, his intent, his state of mind, for the validity of his conduct under the Amendment? Or, to put it conversely: to what extent, and under what circumstances, should the rules of Fourth Amendment regulation be fashioned to take account of the officer's purpose, his intent, as distinguished from a wholly objective assessment of what he does?

A few specific applications of the issue will exemplify, but not exhaust, its range. (1) A highway patrolman flags down a motorist, asks to see his operator's license and, looking through the outside windows of the car, perceives recognizable contraband on the floor of the rear seat. The officer has no warrant for the car or driver, and no probable cause to believe that the car is carrying contraband or that its driver has committed or is committing a crime. Is it material to the lawfulness of the stop whether the officer is engaged in a *bona fide* license check or is using the license check to try out his suspicion (not amounting to probable cause) that the driver is rum-running? (2) A postal inspector opens a third-class envelope without a warrant and discovers obscene literature. Is it material to the lawfulness of the search whether his purpose was to assure that the envelope's contents qualified for the third-

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* This brief is limited to discussion of the single issue identified in the text. We do not treat other grounds upon which the decision below might be affirmed.

class rate, or was to verify his suspicion that obscene mailings were emanating from a particular sender? (3) An officer sees a group of bearded and bizarrely dressed young men gathered in a public park. He stations himself nearby and, when one of the young men is heard to curse, arrests him for profanity and searches him incident to the arrest, discovering marijuana. Is it material to the lawfulness of the arrest and search whether the arrest was in fact designed to hold the man to answer a profanity charge, and the search to protect the officer against a possible concealed weapon; or whether both arrest and search were motivated by the officer's wish to check for marijuana? (4) An undercover agent for the Federal Bureau of Narcotics makes a purchase of illicit heroin from Mr. X. On the basis of this transaction, FBN agents obtain a valid warrant for the arrest of X. They execute it by arresting X in his apartment, and they search the apartment after the arrest. Is it material to the lawfulness of the entry, arrest and search whether the decision to arrest X at home was made because he happened to be home at the first convenient opportunity for an arrest following the issuance of the warrant, or because the officers preferred to stage the arrest in a fashion that would allow "incidental" search of the apartment?

There are numerous other sorts of Fourth Amendment questions which do—or might doctrinally be made to—implicate a law officer's purpose or intent. The several specific situations described in the preceding paragraph will serve to delimit the sort of case which we propose to discuss in this brief. They are characterized by the following attributes: (A) A power is claimed by a law enforcement officer to engage in conduct that intrudes upon

the privacy or personality of a citizen (the power to stop a moving car, to open a mailed envelope, to make an arrest, to enter an apartment). (B) The allowance of that power consistently with the Fourth Amendment is sought to be justified by the existence of a specific law enforcement need (to check operators' licenses, in order to guard against the dangers of unlicensed drivers; to inspect low-postage mail, in order to assure against abuse of limited mailing privileges by employment of the low rate for non-qualifying mail; to make an arrest, in order to assure the presence of an accused at his trial; to enter a dwelling, in order to effect an arrest). (C) The power may in fact be exercised by an officer for some other purpose than the one which is asserted to justify it. The questions that are judicially posed in such cases are: Should the power claimed be allowed at all? If so, under what circumstances? Should the circumstances that condition the allowable exercise of the power include the requirement that it be used for the purpose for which it was given? Should other doctrinal devices be employed to assure that, for the most part, the power will be used only in the service of the purpose for which it was given?

These questions may be made somewhat more concrete by identifying the sorts of possible judicially formulable rules in one of our hypothetical situations. We take the case of third-class mail. The Court might say that although first-class mail may be opened only upon a warrant (this is so both by force of an early dictum of this Court construing the Fourth Amendment, and more recently by force of statute), third-class mail may be opened without a warrant. The justification for such a decision would doubtless be that some sort of a check (without probable cause) of pur-

ported low-postage mail is necessary to assure the integrity of the postal rate structure, and that the extent of the intrusion involved in such inspection is not incommensurate in light of the regulatory or law enforcement need, particularly since the citizen can purchase the protection of the warrant requirement for a few cents more. Having allowed the power to make warrantless search of third-class mail, the Court might hold that that power can be exercised irrespective of the searcher's purpose, and that anything found may be used in evidence without restriction. Or it might say that the search power is unlawfully exercised whenever it appears that the searcher's purpose was not rate-control inspection but criminal investigation, since the sole justification for allowing the power is not present in such a case. Alternatively, the Court might fashion a rule excluding from evidence anything found in a third-class mail search *except* evidence that non-qualifying mail was sent under third-class rates. The rationale of this last rule, of course, would be to discourage abuse of the rate-control search power by removing any incentive to employ it for ulterior purposes, thus leaving postal inspectors no motive for search except that which supports the search power given.

The dangers of abuse of a particular power are, we would suppose, a pertinent consideration in determining whether the power should be allowed in the first instance. Thus, it is not inconceivable that the Court might conclude that the intrusiveness of third-class mail inspection, *plus* the possibility of its abuse as a means for criminal investigation free of the usual warrant safeguard, outweigh concerns for the integrity of the postal rate structure, and compel the conclusion that warrantless third-class mail

searches should never be allowed. We think it still more likely that the Court might say that motor-vehicle stoppings without probable cause are altogether impermissible, because the danger of abuse of the license-check pretext far outweighs the need of the police to apprehend unlicensed drivers not observed to be violating other traffic laws or driving unsafely. Such total disallowance of a claimed police power on grounds of its potential for abuse is particularly justifiable where the power is extremely intrusive, the potential for abuse is high, and the asserted justificatory need is not particularly weighty even in cases squarely and legitimately within the scope of justification.

But the need for a particular police power may sometimes be intense, although narrow. We do not suppose that the Court would hold it unconstitutional to make an arrest upon probable cause (or at least on view) for any minor offense, simply because the arrest power may be—and, indeed, very frequently is—abused by its employment as an investigative tool. The justifications for arrest—to stop a course of criminal conduct, and to assure that the offender is forthcoming for prosecution—are probably sufficiently compelling to preclude entire disallowance of the arrest power. The question remains: should curbs be retained against the likely abuse? One such curb would be to disallow any search incident to minor-offense arrests, or at least to require the exclusion from evidence of anything found in "incidental" searches. Another would be to pursue inquiry into the officer's "purpose" in making the arrest, and hold the arrest unlawful if the purpose were found bad. The first alternative is obviously the more drastic.

It might well be that in the case of police powers whose intrusive quality is not great or the likelihood of whose abuse is exceedingly slight, neither of the alternative curbs is appropriate. Where the power is very intrusive and the likelihood of abuse substantial, the drastic exclusionary sanction may be called for. For example, if this Court *were* to hold that police may stop motorists without probable cause for "license checks," we would think that the case for a rule excluding from evidence anything observed in the course of the stop would be compelling. We say this without ignoring the doctrinal problems involved in such a rule, which unhinges the exclusionary sanction from the "substantive" constitutional regulation that it enforces, and applies exclusion to the product of a practice that is not itself constitutionally condemned. But we do not think the doctrinal problem insurmountable, since the Court's decisions firmly establish that the exclusionary sanction is, in its entirety, a judicially created enforcement technique and, as such, judicially malleable to serve its vital purposes. However that may be, situations involving lesser degrees of police intrusion or of likelihood of abuse probably do not demand or justify the use of a broad exclusionary rule to discourage abuses. In some such situations, we think the alternative safeguard—inquiry into police purpose—is appropriate.

That brings us to the present case. The matter comes here after concurrent findings by two federal courts below that police officers went to Painten's door and knocked with the purpose of entering to make an arrest and search of the apartment. The officers had no search warrant, nor even probable cause. Those findings have record support and it would be inconsistent with the usual scope of review

by this Court to upset them. The question, then, is whether on such facts the police conduct violated the Fourth Amendment.

The Commonwealth of Massachusetts argues that it did not. The Commonwealth does not contend that the officers' purpose—if it was what both courts below found that it was—was licit. Such a contention could not be entertained, for the most fundamental principles of the Fourth Amendment condemn a warrantless police entry into a dwelling in the night time, without probable cause to arrest an occupant. But the Commonwealth says that this purpose is constitutionally irrelevant. The Fourth Amendment question, it argues, is addressed only to what the officers *did*, not why they did it. Starting from the premises, then, that officers may constitutionally knock at a citizen's door for any of a number of licit purposes—to make inquiries of persons inside, to ask the inhabitants to cooperate in observing a new parking regulation, to sell tickets to the Policemen's Ball—the argument proceeds through the principle of irrelevancy of motive to the conclusion that the knock on the door in this case, although a sly subversion of police power, was not in excess of such power and hence should be sustained.

The argument is beguiling. It purports to pose for this Court's choice two inconsistent perspectives in the enforcement of the Fourth Amendment: the "objective" perspective and the "subjective" perspective. The objective perspective concerns itself only with the circumstances under which the police act, and the nature of their conduct in those circumstances. The subjective perspective turns constitutional consequences on what the police are thinking. As between these two perspectives, the objective one is

preferred. This is so for reasons which the Commonwealth articulates forcefully. Fourth Amendment rules are principally mandates for the harried policeman and the hurried motions judge. They should be as simple and workable as possible, so that the policeman can know what is expected of him and the judge can enforce it. Subjective standards are difficult to abide by, hard to administer. Judicial investigation of police purpose is a frustrating, ordinarily futile endeavor; and the policeman cannot predict its outcome. The impracticable trial of mental states is, in any event, not worth the trouble, since whatever it is that the policeman does is equally intrusive upon his suspect's privacy, whatever its motivation. What the citizen cares about, and what the Amendment restricts, is where, under what circumstances, the policeman's body ends up, not by what cogitative paths his mind leads him there.

We agree with these points, and with the conclusion that any general principle of Fourth Amendment construction that turns its restraints in large part upon inquiry into police mental states would be unbearable. A broadly "subjective" perspective would commit the guarantees of the Fourth Amendment almost entirely into the keeping of the police—whose restraint is the Amendment's purpose. In saying this, we do not refer principally to the risk of police perjury, although perjury is a factor to be reckoned with. The more essential problem is that rules focused on police purpose are a self-fulfilling prophecy. If a policeman is told that a certain purpose validates what he wants to do, he will honestly have that purpose. He would be less than human if he did not.

For this reason—and because the Fourth Amendment *is* more concerned with the tangible invasions of a citizen's

privacy than with the policeman's intangible accompanying cerebrations—most of the rules restricting police conduct have to be strictly objective. They must describe what acts a policeman is permitted to do under what circumstances, and hold unconstitutional any objective excess of action or objective deficiency of justification. Absent a warrant (or "exceptional circumstances"), for example, a policeman cannot be permitted to enter a dwelling for any purpose, however benign. If he comes selling Policemen's Ball tickets, he may knock at the door; but, if he receives no answer, he may not try the knob and enter.

It does not follow, however, that because the rules constraining the maximum permissible allowance of police authority in various situations under the Fourth Amendment must be objective, that *all* Fourth Amendment rules must be. To say that licit motive cannot validate an objectively invalid search or seizure, does not compel the converse proposition: that *illicit* motive can never *invalidate* an objectively valid one. Here is where we part company with the Commonwealth, and with its analysis that invites this Court to choose between a subjective and an objective Fourth Amendment. We think no such choice is posed.

Rather, we submit, *either* a wholly subjective or a wholly objective perspective on the Fourth Amendment—a general reliance upon, or a total exclusion from consideration of, police "purpose," "intent," "motivation"—would defeat the Amendment as an instrument of practical government. We have stated our objections to a subjective Fourth Amendment in the immediately preceding paragraphs. Our objections to a wholly objective Fourth Amendment derive from the considerations we identified earlier in the brief.

Under any set of Fourth Amendment principles, certain powers must be given the police for specific and limited purposes—that is, under the impulsion of specific and limited justifications. These powers are given them not because their exercise is not intrusive, but because its intrusiveness is justified in light of particular law enforcement needs. When the needs are not present the justification fails, and an impermissible intrusion remains. Of course, the objective circumstances which are made the prerequisite conditions of the power serve to assure that, in some measure, its exercise will be confined to the general area of the justificatory need. Allowance of police power to enter a dwelling to make an arrest, for example, is "objectively" limited to situations where the police have the makings of a valid arrest (an arrest warrant or probable cause), and where they have reasonable grounds to believe that the person sought to be arrested is in the dwelling. If either of these prerequisite conditions fails, the need justifying the power of entry fails, "objective" circumstances proclaim its failure, and the power is withdrawn under "objective" standards. The trouble is that there is often only a very approximative correlation between the justificatory need and any definable set of objective circumstances; thus, the need may be lacking although all of its objective components are present and accounted for. Police who have a valid arrest warrant for a man reasonably believed to be in a dwelling do not invariably have to enter to arrest him; often they choose not to do so; and when, conversely, they do choose to enter, it may be for very different reasons than those whose supposition persuades the courts to grant the entry power.

The fewer the objective conditions on any given power, of course, the less effective are those conditions as a means

of assuring some rough alignment between the exercises of the power and its justifications. The only limitation on the power of third-class mail inspection is that the mail be third class. But there is palpably no need to open every piece of third class mail, and the postal inspectors do not. The principles by which they determine what third-class mail to open, therefore, may stray very far from the judicially recognized justification relating to postal rates, and no "objective" check be available to hold the power in line. In such a situation (and unless the courts are willing to fashion a blanket exclusionary rule of the sort we have suggested above), a "subjective" check via inquiry into the officer's purpose seems to us better than no check at all.

This is certainly the case, we believe, with the power of policemen to knock on the doors of dwellings in the night time, as happened to Donald Painten. A night-time knock on the door is no small intrusion to a home-owner. The potential of the knocking practice for abuse—its potential employment by police with no legitimate business, banging around to see whether something turns up—must surely be apparent to anyone who notes in the Advance Sheets alone the number of defendants convicted on police testimony of what was seen through the crack of a half-opened apartment door. And, on the Commonwealth's own theory in this Court, the practice is not objectively regulable, because there are no necessary objective preconditions to its validity: police may knock on *any* door, on *any* set of facts, without probable cause, as they did to Painten. We think that state of affairs falls considerably short of the protection of the people in their houses envisaged by the Fourth Amendment. Unless this Court is prepared to declare a broader "objective" safeguarding rule—that police without a war-

rant and without probable cause are never permitted to knock on the doors of dwellings in the night time; or that, at the least, anything they observe as a result of the knock is inadmissible in evidence in a subsequent criminal trial of the home-owner—we submit that the least the Amendment requires is the check of a "subjective" inquiry into the question whether the knocking officer's purposes were within the range of those legitimate ones for whose effectuation the power to knock is given him.

We do not make this submission in the expectation that many entries will be judicially invalidated as a result of inquiries into police purpose. In our experience at least, the courts below reached a rare result in making factual findings against the police. Such findings are rarer still in state courts than federal, and almost never are made if a policeman testifies squarely to any set of facts on the basis of which his action can be sustained. If this habitual tendency of judges to credit police testimony is coupled with the natural tendency of the police to testify whatever is necessary to validate their conduct—a tendency which the Commonwealth candidly admits at page 9 of its brief by the observation that "Under the decision of the Court of Appeals, . . . police officers would feel compelled to give reasons other than the true ones"—few police actions are going to be invalidated by reason of illicit purpose. But even if this be true, the inquiry serves some useful purposes.

Experienced criminal attorneys are often heard to remark that police testimony in search-and-seizure cases has the monotonous sameness that was proverbially characteristic of uncontested divorce cases under the (old) New York

law. Policemen can and apparently do "feel compelled to give . . . other than true" testimony about physical facts as well as psychic ones. Nevertheless, trial courts habitually believe them, and appellate courts habitually affirm the trial courts. There is often something of an air of unreality about this whole business in the motions court. What is being litigated is what this Court recently said was a valid piece of police work, rather than what happened to the defendant who is moving to suppress.

Inquiry into police motive or purpose can oftentimes breathe some fresh air of reality into the process. This is so not because "pat" tales of licit motive are impossible to construct falsely. They are often easy to construct. But the officer who abuses his powers by exploiting them for impermissible ends has a somewhat more difficult time squaring his testimony with *both* objectively verifiable fact (which is not known independently by the judge, but may be provable by the defense) *and* a plausible-sounding theory of police purposes and objectives (as to which the judge, before long, begins to form his own general impressions on the basis of past police testimony he has heard, together with a common-sense appreciation of what the police are after), than with the verifiable facts alone. The conflicts between facts and ostensible purposes may be made the matter of embarrassing cross-examination (whose prospect itself may be some deterrent to police illegality); and even though the motions judge credits the officer in the end, he may do so with some unease that tends in the end to give him a warranted skepticism toward police testimony in these cases. Appellate courts, also, may affirm; but, again, not without the unease that is engendered by exposure to records on which the lower courts credited

seemingly incredible testimony. These, we think, are processes that tend toward the maintenance of healthy correctives within a system of litigation that turns almost entirely upon professional testimony by officers.

We must emphasize again that in making these last points we are not supposing a prevalent condition of wholesale police perjury; nor does our submission in this Court rest on any such supposition. We merely answer the Commonwealth's point that the only effect of judicial inquiry into police purpose is to compel the police to lie. We think rather that they will tell the truth sometimes and lie sometimes; that they will act with some awareness of the inconveniences of having to lie; that when they lie, they will sometimes be caught at it; that more frequently they will not; but that the litigation process will be better ventilated by reason of the inquiry into why they did what they did. And the Fourth Amendment, we submit, will be better served by the resulting constant reemphasis—and occasional vindication—of the principle that police intrusive powers, allowed only because judicially deemed necessary for one or a few limited purposes, may not with complete impunity be subverted to others which encourage their over-frequent exercise.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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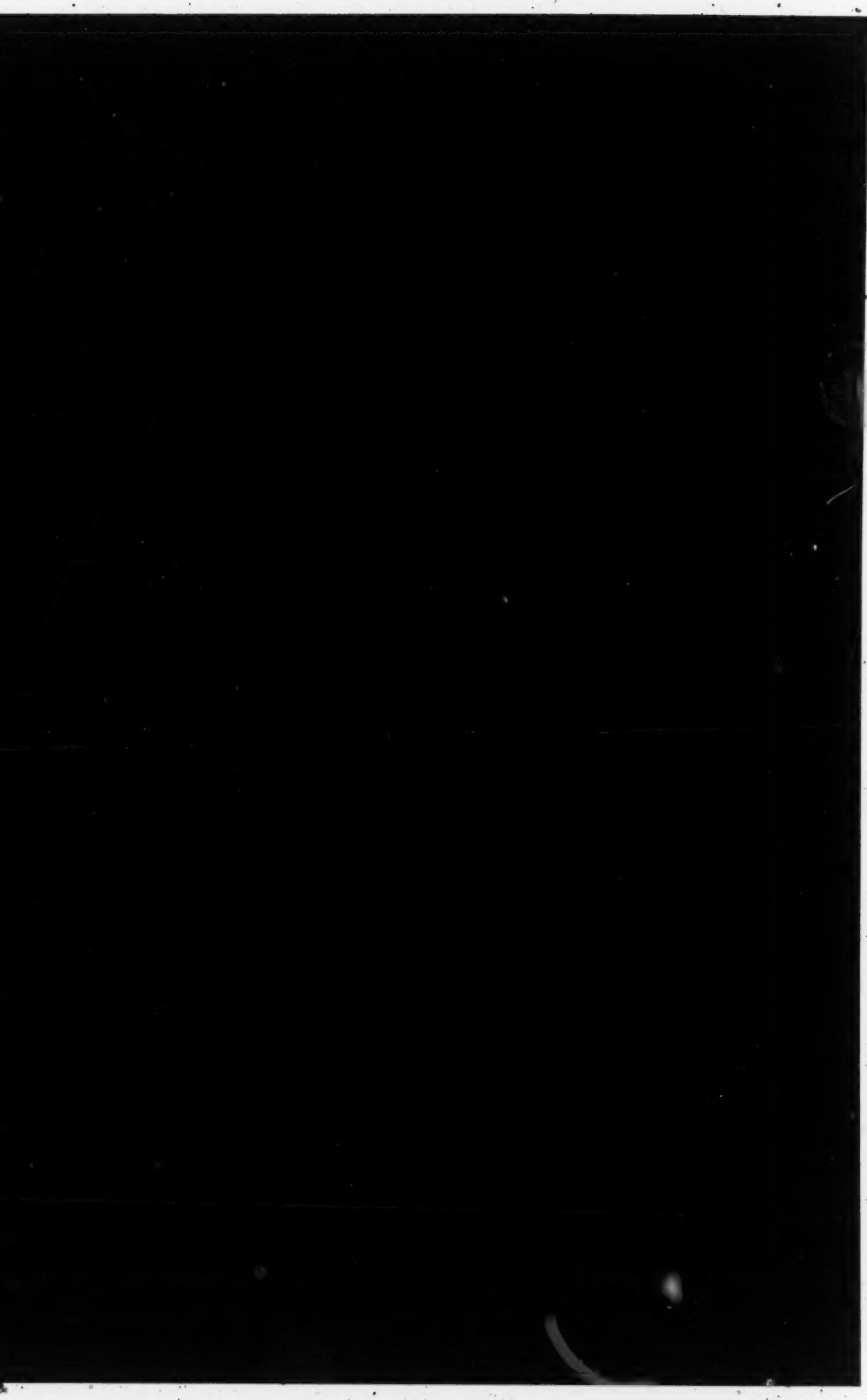

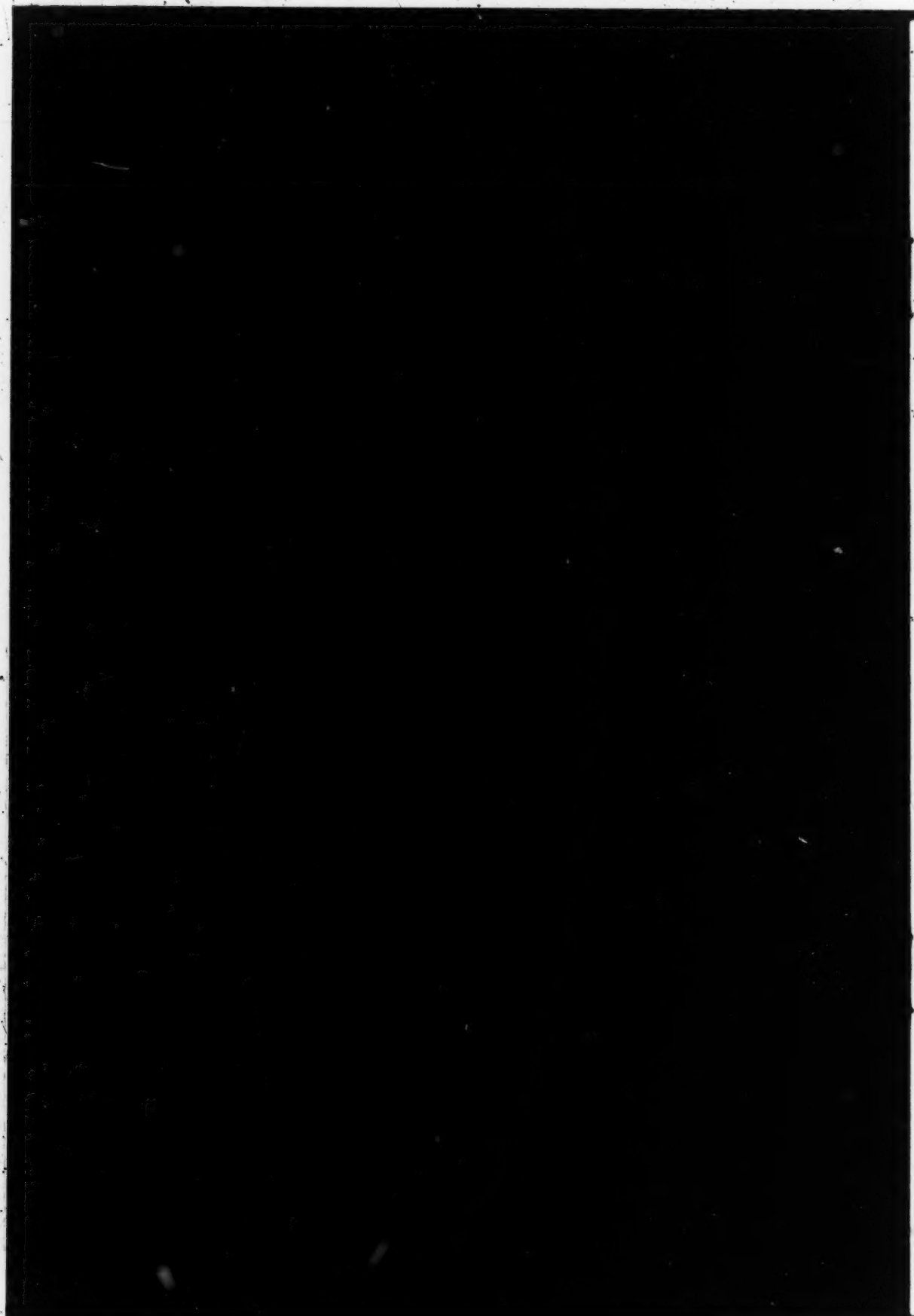

Table of Contents.

Argument	1
Conclusion	5

Table of Authorities Cited.

Cases.

Commonwealth v. Lawton, 348 Mass. 129	3
Jackson v. United States, 302 F. 2d 194 (4th Cir. 1962)	3

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

Argument.

The respondent heavily relies on his own testimony which he gave as a witness during the evidentiary hearing before the District Court (Respondent's Brief, page 13) (R. 15-16).

> ". . . I opened the door and as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them."

The District Court judge chose to rely, instead, on the testimony of the police officers, which testimony was elicited during the evidentiary hearing before him. That testimony, furthermore, was relied upon by the United States Court

of Appeals for the First Circuit (R. 27) (R. 62) (Respondent's Brief, page 12).

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' "

Quite obviously it is improper at this late stage of the case, where the record of the state court proceedings is not before this Court, for the respondent to attempt to rely on testimony which is plainly inconsistent with the facts found by the District Court. The findings of the District Court judge, made on the basis of a comprehensive record and after seeing and hearing the witnesses, are controlling, as the Court of Appeals itself recognized (R. 61-63, where the Court of Appeals indicates its reliance upon the District Court's findings of fact).

Furthermore, the respondent, in contending that the police officers lacked sufficient reason for going to his apartment, tends to view the facts singularly rather than collectively. We submit that, when the facts are viewed either as an entirety or as one transaction, the police officers rightfully possessed reasonable suspicion that the respondent had been engaged in some criminal enterprise. The cumulative effect of those facts known to the police officers unmistakably leads to this conclusion.

The fact that a number of liquor store holdups had recently occurred was known to the police officers. Moreover, both the respondent and his companion, by their criminal records, were known to the police officers. Respondent's companion, Ash, fled as the officer was keeping him under surveillance (R. 25). His conduct, without more, while it fell short of probable cause, did warrant the belief by the

police officer that some criminal activity on the part of the respondent and his companion was afoot and should be investigated.

A police officer is trained both to evaluate quickly all situations confronting him and to act accordingly. The burden is on the officer to decide, on the spot, what course of action is required in any given situation.

> "A police officer in the solution of a crime and in the presence of one he thinks committed it is not a judge with time for mature consideration. On the contrary, his position more nearly resembles that of a sentry at his post in time of war. Upon his alertness and judgment depends the safety of the many." *Commonwealth* v. *Lawton,* 348 Mass. 129, 132-133.

In the case at bar the officers under the circumstances, conditioned by their observations and information and guided by the whole of their police experience, reasonably and properly believed that the respondent and his companion either had committed, or were about to commit, some criminal offense. *Jackson* v. *United States,* 302 F. 2d 194, 196 (4th Cir. 1962).

The police officers in the instant case, having reason to suspect the respondent and his companion of some unlawful design, thus set out to investigate. The officers' call for additional officers to assist them (R. 27) was certainly a sound safety-precaution; the officers were prudent in making this call for, by so doing, they prepared themselves for whatever might possibly develop. The request for and the presence of additional officers does not indicate an intent to arrest the respondent at the moment of the officers' entry into respondent's apartment. The calling of additional officers was merely good police practice.

The amicus brief claims and seeks to point out in its examples that the objective test which we ask this Court to use has an inherent potential for abuse of power by the police. The amicus' illustrations bear little relation to the factual circumstances in Painten. The circumstances in Painten are ones neither where an officer in a door-to-door general inquiry knocks on all doors of an apartment house, nor one where a postal inspector in general pursuit of unlawful matter opens every letter. In the case at bar, even at the very outset, the policemen had knowledge of a number of highly suggestive and significant facts—Ash's suspicious conduct and his flight from them, the fact that both of these men had criminal records, the knowledge that there had been a rash of liquor store holdups in the vicinity. These facts were doubtless insufficient to constitute probable cause to arrest but were enough so that had the police failed to make further inquiry of the respondent, they might well be thought to be lacking in the initiative which the public is entitled to expect from responsible police officers.

Surely, the police knew enough to cause them to go to and to knock on the door of respondent's apartment. Their act was not part of a general "door-knocking campaign"; here the police, without abusing their power, had enough information to warrant their knock on Painten's door. The amicus brief fails to deal effectively with the Painten circumstances insofar as it treats the police officers' knock on one door similar to a "door-knocking campaign."

We claim that a policeman's appraisal of facts known to him is an objective evaluation. We claim, furthermore, that when the facts known to Officers McNamara and Maxwell were objectively evaluated by them, they correctly concluded upon these facts that they had an affirmative duty to make inquiry of the respondent.

Admittedly the use of the words "objective" and "subjective" can bog down in a profitless dispute over words. What the Commonwealth means to assert by use of the term "objective test" is that an officer's personal motives, hopes and aspirations are irrelevant so long as his conduct, viewed objectively and based on all the facts and circumstances known to him at the time, is the conduct of a reasonable law-enforcement officer. The individual officer's hopes, desires and aspirations obviously belong to the tangled realm of psychiatry and psychology. What a court can properly do, however, is to consider all the facts known to the officer and then ask itself whether a reasonable officer, knowing such facts, would have acted as this officer acted. Any other test would involve both a profitless and an impossible attempt to probe the individual personality of the officer; such a probe would be of little relevance to the issue at hand, which is the protection of the rights of the accused.

Conclusion.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ELLIOT L. RICHARDSON,
Attorney General,
By WILLIE J. DAVIS,
Assistant Attorney General,
JAMES B. KRASNOO,
Assistant Attorney General.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1967.

Massachusetts, Petitioner, v. Donald M. Painten.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January 15, 1968.]

Per Curiam.

In 1958 respondent was tried and convicted in Middlesex Superior Court, Massachusetts, for armed robbery of a bank and related offenses. He appealed, and in 1961 his conviction was affirmed by the Supreme Judicial Court of Massachusetts, *sub nom. Commonwealth* v. *Binkiewicz*, 342 Mass. 740.

Respondent eventually filed a petition for a writ of habeas corpus in the Federal District Court. Testimony was taken by the District Court on December 30, 1965. It ruled that respondent's Fourth Amendment rights had been violated by the entry into his apartment, by his arrest and by the search and seizure of certain articles in his apartment which were introduced in evidence against him. Accordingly, it set aside his conviction and ordered his release.[1] *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The Court of Appeals affirmed.[2] We granted certiorari because of the importance of the constitutional issues presented.[3]

At the time of respondent's trial in 1958, Massachusetts did not have an exclusionary rule for evidence obtained by an illegal search or seizure, *Commonwealth*

[1] 252 F. Supp. 851 (D. C. D. Mass. 1966).
[2] 368 F. 2d 142 (C. A. 1st Cir. 1966).
[3] 386 U. S. 931 (1967).

v. *Wilkins*, 243 Mass. 356 (1923); *Commonwealth* v. *Spofford*, 343 Mass. 703, 706 (1962), and the parties did not focus upon the issues now before us. The evidentiary hearing in 1965 took place almost eight years after the events.

After oral argument and study of the record, we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case. The writ is therefore dismissed as improvidently granted. Cf. *Smith* v. *Mississippi*, 373 U. S. 238 (1963).

Dismissed.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1967.

Massachusetts, Petitioner, v. Donald M. Painten. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January 15, 1968.]

Mr. Justice Fortas, concurring.

The dissent written by my Brother White, with whom my Brothers Harlan and Stewart join, impels me to add this note. I agree with the Court's action in dismissing the writ of certiorari for having been improvidently granted because the record is not adequate for disposition of the case in terms of its constitutional problems. Mr. Justice White's opinion is not in disagreement on this point. He would remand the case for a purpose which seems to me to be unreal: that is, to hold an inquiry, almost 10 years after the event, as to "whether Officer Rufo could have believed that the bag had been abandoned and whether the bag was searched before or after guns were observed." This inquiry—at this late date—is as elusive as an attempt to capture last night's moonbeam.

As some of my colleagues have often said, we do not sit as a court of criminal appeals to review a judgment of state courts. The question in the instant case comes here as a result of federal habeas corpus proceedings. We should consider it if and only if we should and can dispose of it on its record in terms of constitutional principle. The Court's disposition of this case is based upon the sound premise that we should not use our certiorari jurisdiction to express our views on a point in a case

which we cannot dispose of because of inadequacies of the record which cannot realistically be remedied.

I should not ordinarily feel it necessary to file a comment in this vein. In the present situation, I am troubled lest my Brother WHITE's dissent should give the impression that only he and my Brothers HARLAN and STEWART believe that the court below erred in relying on its inferences as to the undisclosed intent of the officers. I agree with the Court's disposition of this case, not because I disagree with the position stated in the dissent on this issue, but because oral argument and detailed consideration of the case after certiorari was granted disclosed the infirmity of the record which precludes the orderly disposition of the case by this Court.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1967.

Massachusetts, Petitioner, v. Donald M. Painten. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[January 15, 1968.]

Mr. Justice White, with whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

The Court granted certiorari [1] because the rule of law applied by the Court of Appeals to the facts found by both it [2] and the District Court [3] raised troubling and difficult questions about the restrictions imposed by the Fourth Amendment on evidence that may be admitted at a criminal trial. The Court now says, quite rightly, that the record in this case is stale and the facts unclear. We have, however, a set of facts found by a United States District Court and approved by a Court of Appeals. Determining what legal consequences should follow from those facts is difficult, but is the task normally entrusted to this Court. I would accept the facts found by two federal courts and decide the questions of law presented to us.

The relevant facts found below are as follows. Two police officers, having a suspicion that respondent had committed felonies but not having probable cause to believe that he had committed them, went to the door of respondent's apartment. Their motive, the courts below found, was to arrest and search, whether or not their investigation provided the probable cause that would

[1] 386 U. S. 931 (1967).

[2] 368 F. 2d 142 (C. A. 1st Cir. 1966).

[3] 252 F. Supp. 851 (D. C. D. Mass. 1966).

make an arrest and search constitutional. This plan was not communicated to respondent, who when he came to the door was led to believe the officers wished only to speak to him. Told no more than that the officers wished to ask questions, respondent asked them to wait a minute, closed the door, tossed a paper bag onto a fire escape, returned, and let the officers enter. The officers did nothing to respondent but ask questions;[4] while doing that another officer, posted below, who had seen the bag drop, walked through the apartment and out onto the fire escape, where he found guns and bullets in the bag. The officers arrested respondent, and undertook a complete search of the apartment incident to the arrest.

On these facts the District Court concluded that "since the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry." 252 F. Supp., at 857. The Court of Appeals agreed, saying that the officers "set out to arrest and search [respondent] in the hope that evidence would develop," and that "since their actions were improper, the police were not entitled to the fruits." 368 F. 2d, at 144. The question is thus whether the fact that the officers were not truthful in telling respondent their intentions required that the evidence found by the policemen after they entered the apartment be barred from admission at respondent's trial as a "fruit" of unlawful police conduct.

The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates

[4] One officer "stuck his hand into" the pocket of respondent's companion, one Ash, and "found about $200.00 in ten and twenty dollar bills stuffed in the pocket." 252 F. Supp., at 856. The bills were apparently not introduced at respondent's trial, but the officers' conduct in searching Ash without justification may well have influenced the courts below on the question of the officers' intentions.

all of his later behavior. In the case before us the syllogism must be that although the policeman's words requested entry for the purpose of asking respondent questions, and the policeman—on being allowed to enter—did nothing to respondent but ask questions, the "fruits" of the policeman's otherwise lawful request to enter and question—the bag tossed out of the window and into a place where it could be seen from the street—should not be usable by the State. This is because the policeman was willing, had his lawful conduct not developed probable cause justifying respondent's arrest, to search respondent's apartment unlawfully in the hope of finding evidence of a crime.

That such a rule makes no sense is apparent when one sees it in the context of an abstruse application of the exclusionary rule, imposed on the States as the only available way to encourage compliance by state police officers with the commands of the Fourth Amendment. See *Mapp* v. *Ohio*, 367 U. S. 643, 652–653 (1961). Because we wish to deter policemen from searching without a warrant, we would bar admission of evidence Officer McNamara discovered by ransacking respondent's apartment without a warrant or a basis for warrantless search. The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial re-

sources. I voted to grant certiorari in this case in the hope the Court would state that the Court of Appeals erred in its view that a policeman's unlawful subjective intentions require exclusion of evidence obtained by lawful conduct, and I would not dismiss while the opportunity of so stating remains.

A second ground that could support a view that the officers' entry was unlawful is the position that the policemen's untruths—their failure to tell respondent of their plan—"vitiated" his consent to their entry. I might not agree with but I could understand a position that police officers, acting without a warrant, can obtain lawful consent to enter a home and ask questions only by explaining to the occupants that they have a constitutional right to deny admission, even to officers of the law conducting an authorized and necessary investigation. But I cannot understand a view that consent is permissible if given in response to a mere request to enter uttered by a policeman wishing only to ask questions but not if given to a policeman who says he wishes to question but in fact intends to do more. If the policeman does more we will bar admission of the fruits of his illegal action. But if he does only so much as he has told the occupant he will do, and so less than he was willing to do, the occupant's consent was to the conduct which occurred; in that case there is no reason to exclude what the policeman learns from doing what the occupant consented to his doing.

There remains a possibility that respondent's confinement may offend the Constitution. When the officers entered respondent's apartment, they had permission to ask questions but no permission to search. Had they looked in closets or drawers, or even in a closed paper bag lying in view, they would have been acting in violation of the Fourth Amendment. The paper bag con-

taining the guns was on a fire escape attached to an apartment other than respondent's, but that alone did not give the officers permission to seize it. The Fourth Amendment's protection extends to "effects" as well as to "persons, houses, papers." Of course "abandoned" property may be seized, *Abel* v. *United States*, 362 U. S. 217, 241 (1960), but neither court below inquired whether Officer Rufo reasonably believed this bag had been abandoned or instead should reasonably have thought respondent had set it on the fire escape temporarily without wishing to abandon it, cf. *Rios* v. *United States*, 364 U. S. 253, 262, n. 6 (1960). If the bag was not abandoned, another question of fact is relevant: whether Officer Rufo saw that the bag contained guns before he opened it, or opened the bag and then saw the guns. Since neither the District Court nor the Court of Appeals reached these issues, I would vacate the judgment of the Court of Appeals and remand the case to the District Court to determine whether Officer Rufo could have believed that the bag had been abandoned and whether the bag was searched before or after guns were observed.[5]

[5] MR. JUSTICE FORTAS, although he does not disagree with the view that the Court of Appeals erred in issuing the writ of habeas corpus for the reasons which it gave, would nevertheless dismiss the writ of certiorari because the record is stale and inadequate with respect to the issue of abandonment. But if it was error to issue the writ of habeas corpus on the grounds relied on by the Court of Appeals—and there is no infirmity in the record with respect to this question—then the judgment should be reversed unless there is some other basis for the issuance of habeas corpus at the behest of this state prisoner. If the record is unclear with respect to this possible additional ground—here the search of the bag and the seizure of the guns—and it is thought undesirable to have the record reopened and the question clarified, the case should simply be reversed, not dismissed so that the erroneous judgment remains in effect. Habeas corpus should not issue and Painten should not be released unless the record clearly justifies such a judgment.